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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

THE STATE OF IDAHO,

Petitioner,

vs.

JAIMI DEAN CHARBONEAU,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Idaho

PETITION FOR WRIT OF CERTIORARI

JIM JONES
Attorney General of
the State of Idaho

LYNN THOMAS
Solicitor General
Statehouse, Room 210
Boise, Idaho 83720
Telephone: (208) 334-2400

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Eighth Amendment, as explained in *Booth v. Maryland*, violated when a sentencing judge, who acts without jury participation, receives evidence bearing on the moral culpability of the defendant which includes incidental information about the victim and opinions about the defendant, but does not use the information as a basis for imposing a sentence of death?

2. Does the confrontation clause of the Sixth Amendment impose upon the use of hearsay evidence in death sentencing proceedings, a limitation, not subject to harmless error analysis, which excludes such evidence unless it has been made part of a presentence report and is deemed reliable by the presentence investigator?

3. Did the Supreme Court of Idaho err in its holding that in a capital case, the Cruel and Unusual Punishment clause of the Eighth Amendment compels the balancing of aggravating and mitigating factors according to a formula whereby all evidence in mitigation must be weighed against each aggravating factor separately.

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OPINION BELOW

The Idaho Supreme Court held: (1) the rule of *Booth v. Maryland*, 428 U.S. 496 (1987) was violated when the sentencing court admitted in evidence, but gave little weight to a letter from the murder victim's father commenting adversely on the defendant's character in a number of particulars and noting also that the victim's daughter had become withdrawn after the murder; (2) hearsay evidence may not be considered by a sentencing judge in a capital proceeding unless such evidence has been made part of a presentence investigation report because of a requirement for "strict compliance" with sentencing procedures in capital cases; (3) a violation of this "strict compliance" rule may not be considered harmless error; and (4) in a death sentencing proceeding, the judge must weigh "all the mitigating circumstances presented . . . against each of the [statutory] aggravating circumstances separately." (Appendix, 52-53)

The decision is still unpublished and has been included in petitioner's appendix.

JURISDICTION

The opinion of the Supreme Court of Idaho was filed April 4, 1989. The state of Idaho filed a timely petition for rehearing, which was denied May 25, 1989.

Petitioner invokes the jurisdiction conferred on this court by 28 USC § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides in part:

". . . nor cruel and unusual punishment inflicted."

The Sixth Amendment, in relevant part provides:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . "

Idaho Code § 19-2515 provides, in pertinent part:

(c) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

(d) In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence.

Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitted may be repeated or amplified if necessary to complete the record.

STATEMENT OF THE CASE

The respondent, Jaimi Dean Charboneau, was convicted of the first degree murder of his former wife, Marilyn Arbaugh. The evidence showed that Charboneau, after remaining in an outbuilding on Marilyn Arbaugh's property for some three days prior to the murder, fired a series of gun shots into the body of Mrs. Arbaugh. Incidents of the murder occurred within the view of the victim's daughter. The gun shots that killed Mrs. Arbaugh were not all fired at the same time. Rather, Charboneau fired two separate volleys of shots with some period of time elapsing between the two, during which time Mrs. Arbaugh was laying on the ground, carrying on a conversation with Charboneau and her daughter.

After a sentencing hearing was conducted, the trial judge sentenced Charboneau to death on findings that the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity, Idaho Code § 19-2515(g)(5) and that by the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life, Idaho Code § 19-2515(g)(6). (See Appendix, 12).

Prior to sentencing, the trial judge was presented with certain information contained in a letter from the

victim's father. The letter responded to claims made by Charboneau and his family "to the court and to the newspapers" about the victim, including allegations she carried a gun and did not pay her bills. There was considerable discussion about the violent nature of Charboneau's relationship with the victim, which added nothing in particular to what had been received in evidence at trial. The letter also reported that Charboneau had harassed the victim's family, asserted that he was "criminally minded," as evidenced by the particularly premeditated nature of his crime and the torture he had previously inflicted upon his victim, and argued that he would be a continuing threat to society if he ever got out of prison. The writer contended that Charboneau had no respect for the law, that a former employer in Montana was not surprised that Charboneau had committed such a crime, that his military records had been inadequately investigated, and that the law enforcement authorities of the county had not done all they could to prevent the crime.

The trial judge indicated that the weight of the letter would be substantially affected, in the court's consideration of it, by its hearsay nature, and by the bias of the writer. (Sentencing Hearing Tr., 220-222, Appendix, 103.) The court took no account of the letter in its sentencing findings. It did not rely on any of the factual matters asserted, nor did the opinions of the writer appear in any manner to have influenced the court's findings.

On review of Charboneau's sentence and conviction, the Idaho Supreme Court set aside the death sentence for the reasons that the letter from Charboneau's father constituted hearsay evidence which, in the view of the Idaho

Court should only have been presented through the presentence report. Mr. Arbaugh's letter was considered a Victim Impact Statement and the court held that it had been admitted in violation of *Booth v. Maryland*, 428 U.S. 496 (1987). The trial court was instructed upon resentencing, to also apply *Booth* to other information contained in the presentence report. The Idaho Supreme Court found that the victim information described above was reversible error, notwithstanding the circumstance that it had not been given weight in the trial court's deliberations.

A third reason for vacating Charboneau's death sentence was that the trial court had incorrectly weighed aggravating and mitigating circumstances in reaching its decision to impose the sentence of death of Charboneau. The Idaho Supreme Court held that "all the mitigating circumstances presented must be weighed against each of the aggravating circumstances separately." (Appendix, 52-53.)

The holding on which the court's order vacating Charboneau's death sentence was based raised federal questions, for the reasons explained hereafter.

MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED AND MADE SUBJECT TO THE JURISDICTION OF THIS COURT.

The Issue Whether The Idaho Supreme Court Erroneously Applied *Booth V. Maryland*.

Charboneau stated in his brief on direct appeal to the Idaho Supreme Court that although the letter from the

victim's father "[did] not involve a victim impact statement (VIS) per se" (App. Br., p. 78, Appendix, 104) it served the same purpose as the victim impact statement condemned in *Booth v. Maryland*, 428 U.S. 496 (1987) and, therefore, "by admission of the letter in question, the [sentencing] court violated defendant's Eighth Amendment rights." (App. Br., p. 79, Appendix, 105.)

The Idaho Supreme Court responded to this claim by holding that the letter contained opinions about the crime and the defendant and therefore was prohibited by *Booth*. The court held further that there was no distinction for purposes of applying *Booth* that rested on the Idaho statutory provision requiring that the sentence be decided by a judge rather than a jury. The error was treated as *per se* reversible. This holding was implicit inasmuch as it was conceded that the sentencing judge had not utilized the letter in pronouncing the death sentence.

The Issue Whether the Confrontation Clause Prohibits the Use of Hearsay Evidence in Death Sentencing Proceedings Unless Such Evidence Has Been Made Part of a Presentence Report; If So, Whether Harmless Error Analysis Applies.

Charboneau defined this issue on appeal thus:

> Did the District Court err in allowing hearsay evidence to be admitted at the mitigation aggravation hearing and were such actions on the part of the District Court contrary to I.C. § 19-2515 and 19-2516 and other state and federal laws and in violation of defendant's Sixth and Eighth Amendment rights. (App. Br., p. 9, Appendix, 106.)

The issue was directed to the letter from the victim's father. The state responded that the letter was substantially concerned with relevant information about the character of the defendant, that any error would be harmless because the trial judge took no account of the letter in making his sentencing decision (Appendix, 109) and that, in any case, a long line of federal precedent permitted the sentencing judge to consider virtually any relevant information about the offender and the crime, no matter what its source, citing *Williams v. New York*, 337 U.S. 241 (1949); *Roberts v. United States*, 445 U.S. 552 (1980); *United States v. Grayson*, 438 U.S. 41 (1978) and other cases. The state also argued that the accuracy of sentencing decisions depends upon the availability of all relevant information, including reliable hearsay.

The Idaho Supreme Court held that Idaho Code § 19-2515(d), which requires that *all* relevant evidence be admissible at sentencing, would be construed to "permit the parties in a formal sentencing hearing to present all relevant evidence that would *otherwise be admissible*," (Appendix, 41). (emphasis added.) Pursuant to *State v. Creech*, 670 P.2d 463 (1983), an exception was recognized for hearsay evidence made part of a presentence investigation report which was intended to include only that hearsay "which the presentence investigator believes is reliable." (Appendix, 42.)

The Idaho court also held that the asserted error could not be subject to harmless error analysis because "in a matter as awesome as the decision whether to impose the death penalty, a strict compliance with the procedures for sentencing is required. Even a well-intentioned and conscientious effort by the trial court to avoid

considering the hearsay contained in the letter does not suffice." (Appendix, 42).

In its petition for rehearing, the state argued, in reliance on *Williams, supra, Roberts, supra, Mullaney v. Wilbur,* 421 U.S. 684 (1975), *United States v. Tucker,* 404 U.S. 443 (1972), *Williams v. Oklahoma,* 358 U.S. 576 (1979), and *Grayson, supra,* that it was *entitled* to have all relevant evidence considered at sentencing, hearsay or not, as provided by its statute enacted in reliance on federal constitutional law. The state also argued that the purpose of the sentencing proceeding was to equip the court with all the facts necessary to make a reasoned sentencing decision and the court's decision was an obstacle to the accomplishment of this purpose. (Appendix, 110-111.) The petition was denied without opinion. (Appendix, 100).

The Issue Whether the Decision of the Idaho Supreme Court That All Mitigation Must be Separately Weighed Against Each Individual Aggravating Factor is Inconsistent With Federal Law.

Charboneau asserted in his brief on appeal that at least one of the statutory aggravating circumstances relied upon by the sentencing court was constitutionally invalid, as a consequence of which *Zant v. Stephens* 462 U.S. 862 (1983) required that the death sentence be vacated. The theory was that *Stephens* recognized that under some statutes there is a requirement for "weighing" aggravation against mitigation and in such cases the failure on appeal of one of multiple aggravating circumstances upsets the balance, making it necessary to vacate the sentence.

In a supplemental brief, filed in response to the decision of the Ninth Circuit Court of Appeals in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), Charboneau asserted that the Idaho statute required the court to weigh all of the mitigating circumstances against each aggravating factor independently. This theory was extracted from statutory language which reads "where the court finds a statutory aggravating circumstance, the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust." Idaho Code § 19-2515(c). Charboneau contended that the sentencing court had not obeyed this requirement and had thus violated "his rights to due process guaranteed under the Fourteenth Amendment to the Federal Constitution and Article 1, § 13 of the Idaho State Constitution." (Appellants Supplemental Brief, p. 73, Appendix, 107) Charboneau also cited several state cases, as well as *Williams v. People*, (sic) 337 U.S. 241 (1949), and *Gardner v. Florida*, 430 U.S. 349 (1977), in support of his argument.

The Idaho court's response to the argument was to hold that "all the mitigating circumstances presented must be weighed against each of the aggravating circumstances separately." (Appendix, 52-53). The constitutional issues were not mentioned.

In its petition for rehearing, the state asserted that "resort to a sentencing system involving statutory aggravating factors is an incident of federal constitutional law," citing *Gregg v. Georgia*, 428 U.S. 153 (1976) and *Godfrey v. Georgia*, 466 U.S. 420 (1980). The state argued that the

court's formulation of weighing requirements was impossible to apply in a principled way and it thus created an element of arbitrariness in the weighing process. The petition was denied without opinion. (Appendix, 100.)

Although the Idaho Court stated that "the plain meaning of the statute dictates our conclusion on this issue" (Appendix, 53), the state asserts herein that this court has jurisdiction to review the holding because the Idaho Supreme Court has based its construction of the state's death penalty statutes on federal constitutional law and because the court evaded a federal constitutional issue.

REASONS FOR GRANTING THE WRIT

I

THIS COURT HAS JURISDICTION TO REVIEW THE ISSUES PRESENTED

The first issue presented is, on its face, an issue of federal constitutional law. The Idaho Supreme Court based its holding squarely on an interpretation of this Court's decision in *Booth v. Maryland* 428 U.S. 496 (1987).

The second issue, which questions the decision of the Idaho Supreme Court excluding reliable hearsay evidence from capital sentencing proceedings, except to the extent that it is properly included in a presentence report, was not *explicitly* based on Charboneau's federal constitutional claim. Nor did the court's opinion refer to the state's contrary arguments that the accuracy of sentencing decisions depends on the court's access to all relevant information, the federal authority cited in support of the

argument, or the state's claim that any error in receiving the letter from the victim's father was harmless because the sentencing judge had not in any manner based his decision on it. No authority of any kind was cited in support of the court's rejection of harmless error analysis. (Appendix 41) The state's argument, presented in its rehearing petition, that its statutes were enacted in reliance on federal law, which entitled the state to have all relevant evidence considered, and which necessitated the consideration of all relevant evidence in order to avoid arbitrary sentencing, was not addressed because the court denied the petition without rehearing.

The Idaho Supreme Court did, however, cite *State v. Creech*, 670 P.2d 463 (Idaho 1983) for the point that an exception to the requirement for "live witnesses" at sentencing hearings was created by Idaho Code § 19-2515 only to the extent that the hearsay evidence to be considered was contained in a presentence report. The discussion of hearsay evidence in *Creech* was prefaced by the statement that "we note at the outset that a sentencing decision made solely on the basis of live testimony is not constitutionally mandated." 670 P.2d at 466. The court cited *Gregg v. Georgia*, 428 U.S. 153 (1976).

The Idaho Supreme Court has held that the state's death penalty statutes were enacted in response to this Court's objections to the kind of mandatory statute the state had in force prior to 1976 and that "[t]o meet this mandate the Idaho legislature enacted an amended version of Idaho Code § 19-2515 [the statute pertinent to this issue] providing for a sentencing hearing at which *all relevant information* could be presented to the sentencing

court . . . " *State v. Osborn*, 631 P.2d 187, 191 (Idaho 1981). (emphasis added)

The circumstances set out above demonstrate that the Idaho Supreme Court necessarily decided a federal question by its holding excluding certain hearsay evidence from capital sentencing proceedings, *Street v. New York*, 394 U.S. 576 (1969) thereby conferring jurisdiction on this court. In addition, this Court held in *Michigan v. Long*, that "when . . . a state court opinion fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed federal law required it to do so." 463 U.S. at 1040-1041. The Idaho court's decision not only contains no plain statement of reliance on an adequate and independent state ground, the circumstance that it was responsive to federal claims and involved statutory construction interwoven with federal concerns, *Osborn, supra*, makes clear that this court has jurisdiction to review the holding. Cf. *Harris v. Reed*, 109 S.Ct. 1038, 1043 (1989) ("We held in [Michigan v.] Long that unless the state court clearly expressed its reliance on an adequate and independent state law ground, this Court may address a federal issue considered by the state court."); *Caldwell v. Mississippi*, 427 U.S. 320 (1985).

Cf. *Beck v. Alabama*, 447 U.S. 625 (1980) (federal claims properly presented to state courts where litigant stated to state court that he was raising Eighth, Sixth and Fourteenth Amendment issues); *Eddings v. Oklahoma*, 455 U.S.

104 (1982) (jurisdiction over a federal question does not depend on citation to book and verse).

With respect to the question whether the Idaho court's holding that all mitigating evidence must be weighed independently against each aggravating circumstance found rests on an adequate and independent state ground, greater difficulty is presented by the court's statement that "the plain meaning of the statute dictates our conclusion" and by its reference to the rule of strict construction of criminal statutes. (Appendix, 53) The court's assertion must, however, be considered against the background of its holding in *Osborn, supra,* setting its construction of Idaho Code § 19-2515, the statute at issue, against this Court's constitutional mandate, and the circumstance that the holding was responsive, at least in part, to federal claims raised by both the defendant and the state. Either the court adopted its construction because it believed federal law required it, *Long, supra,* or it evaded a federal issue. In either case, this court has jurisdiction to review the holding. See *Wolfe v. North Carolina,* 364 U.S. 177 (1960).

II

THE IDAHO SUPREME COURT INCORRECTLY APPLIED *BOOTH V. MARYLAND*

The decision of the Idaho Supreme Court is in conflict with decisions of this Court and the courts of other states. The conflict raises an important question of federal law justifying review.

The court's concern in *Booth v. Maryland,* 482 U.S. 496 (1987), was that a sentencing jury not be distracted by

factors irrelevant to the defendant's character or the nature of the offense. In *Booth*, the subject of the statement presented to the court was the grief and disruption visited upon the victim's family by the crime. The letter from the father of Charboneau's victim, in contrast, was largely a discussion of the nature of the crime, Charboneau's character, and factors tending to emphasize the gravity of the offense. As was the case here, the victim impact statement in *Booth* also contained opinions of the crime and the defendant offered by members of the victim's family.

In *South Carolina v. Gathers*, 109 S.Ct. 2207 (1989), the Court again upheld the exclusion of evidence about the personal characteristics of the victim that were viewed as irrelevant to the defendant's moral culpability.

The Idaho Supreme Court, however, has applied the *Booth* principle to evidence bearing on the moral culpability of the defendant and his dangerousness to society.

It is difficult to see how this Court's decisions in *Booth* and *Gathers* could require the exclusion of information about the defendant's assaultive and threatening behavior. The Idaho Court's decision to exclude such evidence substantially expands the evidence exclusion rule announced in *Booth*.

The sentencing authority is deprived of information each time a decision is made to exclude from its consideration particular evidence. Whatever may be said of the relevance of information about the impact of the crime on the victims, those considerations do not apply to information that bears on the background of the defendant. The

sentencing authority, particularly in a capital case, is expected to have access to all relevant information in order to make a reasoned sentencing decision. *See, Lockett v. Ohio,* 438 U.S. 586 (1978). The importance of the Idaho Supreme Court's decision lies in the fact that it subverts this principle, for which reason its holding should be reviewed by this Court.

In addition, the capital sentencing authority under Idaho law is the judge, who acts without the participation of a jury. The sentencing authority is required to make written findings detailing such aggravating and mitigating factors as may have been found. In such a system, it is possible for a reviewing court to determine whether the findings are based on factors affected by irrelevant evidence about the victim's characteristics. It may also be expected that a judge, trained in the law and presumably able to discriminate between what is relevant and what is not, is better able than a jury to avoid the prejudicial impact of irrelevant evidence. *See, Profitt v. Florida,* 428 U.S. 242, 252 (1976). The Idaho Supreme Court, however, rejects this distinction, saying "the risk of arbitrary and capricious decisions exists whether the sentence is determined by a jury or a judge." (Appendix, 45) This view is not mandated by *Booth v. Maryland,* nor by *South Carolina v. Gathers.* The state is entitled to avoid the pitfalls of a jury sentencing system by choosing judicial sentencing. As the Court has pointed out, there is no one correct way to structure a capital sentencing system. *Gregg v. Georgia, supra.* The Idaho Supreme Court however, invalidates that effort by refusing to recognize that the concerns expressed by this court in *Booth* can be ameliorated by the

type of sentencing authority employed. The Court's decision thus raises a very important question about the flexibility available to a state, within the bounds of the Federal Constitution, to structure its capital sentencing law to avoid constitutional problems.

Finally, although harmless error arguments were made to the Idaho Supreme Court, it treated the receipt of the so-called Victim Impact Statement as reversible error, *per se*. This is a view that cannot be sustained in light of this court's decisions. *See, Maynard v. Cartwright*, 108 S.Ct. 1853 (1988). The Idaho Supreme Court recognizes that the trial court's findings were not based on the "Victim Impact" information, (See Appendix, 42), and the record establishes that the trial court, in imposing the death penalty, did not rely on any of the factual matters asserted in the letter from the victim's father, nor did the opinions of members of the victim's family appear in any manner to have affected the court's findings.

The Idaho court's opinion conflicts with decisions of courts of other states which have applied harmless error analysis to *Booth* violations. *See, People v. Bonin*, 675 P.2d 460 (Cal. 1989) (victim impact evidence which "had no potential to inflame the jurors and hence could not have exposed the defendant to prejudice" not a basis for reversal); *Parker v. Dugger*, 537 S.2d 969 (Fla. 1988). (Evidence showed that death sentence was not the product of victim impact information and would not be a basis for reversal.) *See, also, Moon v. State*, 375 SE.2d 442 (Georgia 1988); *People v. Jones*, 528 NE.2d 648 (Ill. 1988).

The Idaho Court's view of *Booth* violations as automatically reversible is a serious obstacle to the state's

enforcement of its death penalty law. It is, in effect, a holding that the most ineffectual errors in the capital sentencing process will require vacation of the sentence. The truth is that this approach could make it nearly impossible to enforce the state's law, for, as has been observed, there is almost always some imperfection in the conduct of a criminal proceeding. *See, United States v. Hasting*, 461 U.S. 499 (1983). *See, also, Delaware v. Van Arsden*, 475 U.S. 673 (1986). The Idaho Supreme Court's decision is clearly a misreading of this Court's decision in *Booth*.

III

THE IDAHO SUPREME COURT ERRONEOUSLY LIMITED THE USE OF HEARSAY EVIDENCE IN CAPITAL SENTENCING PROCEEDINGS

The decision of the Idaho Supreme Court limiting the use of hearsay evidence in capital sentencing proceedings is in conflict with decisions of this Court. At the same time, it raises an important question of Federal Law, justifying review, because the holding limits the state's ability to conduct a non-arbitrary capital sentencing system.

This Court has often called attention to the importance of making the sentencing authority aware of all of the relevant facts that make it possible to impose a sentence in accordance with the degree of culpability with which the defendant acted. *See, Lockett v. Ohio*, 438 U.S. 586 (1978); *California v. Brown*, 479 U.S. 538 (1987); *Tyson v. Arizona*, 481 U.S. 137 (1987); *Enmund v. Florida*, 458, U.S. 782 (1982).

To serve that end, the Court has held that the sentencing judge's inquiry is largely unlimited either as to the kind of information that may be considered at sentencing or its source. *United States v. Grayson*, 438 U.S. 41 (1978).

In *Green v. Georgia*, 442 U.S. 95 (1979), the Court held that the exclusion of hearsay evidence that was highly relevant to a critical issue of punishment was a violation of the due process clause. This holding reflects this Court's scrutiny, as a matter of federal law, over state court construction of death penalty statutes to insure that such constructions are in accord with the requirements of the Eighth Amendment. In *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980), the court explained that "if a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."

Individualized consideration of the defendant's personal culpability is a constitutional requirement in capital sentencing. *Enmund, supra.* This aim cannot be achieved by limitations on the consideration of aggravating evidence that are unrelated to the accuracy of the assessment of moral culpability. The Idaho Supreme Court's rule limits relevant evidence of aggravation on hearsay grounds while *Green, supra,* requires that relevant mitigating hearsay be admitted. The potential for arbitrary skewing of the sentencing findings is obvious. Limiting hearsay evidence in the manner employed by the Idaho court does not promote reliability in sentencing. It has precisely the opposite effect. It excludes relevant evidence that can practically be produced by no other means

and leaves the sentencing authority with only part of the facts.

In *Williams v. New York*, 337 U.S. 241 (1949), this Court held that there was no constitutional bar to considering, at sentencing, information from a presentence report. This material was, of course, hearsay. The information considered by the sentencing judge in *Williams*, included reports of uncharged crimes in statements about the defendant's undesirable character traits.

The Court's reasons for rejecting *Williams'* claim that he had been denied due process of law were the result of the policy of the American Criminal Justice System to sentence offenders on an individualized basis, having regard for the particular offender and the particular offense of which he was convicted. The Court held that there was no reason to conclude that a different policy should apply in capital cases.

See, *also*, *Roberts v. United States*, 445 U.S. 552 (1980); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *United States v. Tucker*, 404 U.S. 443 (1972); *Williams v. Oklahoma*, 358 U.S. 576 (1959).

The defendant's assurance of fairness in the gathering of information that will bear on the sentence ultimately pronounced by the trial judge, is his right to respond to hearsay information made available in the sentencing proceeding, a right specifically codified in Idaho Code § 19-2515(d). *See, Williams v. New York, supra.*

The argument against admitting hearsay evidence in sentencing proceedings in capital cases was that because

the death penalty is qualitatively different from a sentence of imprisonment or, as the Idaho Supreme Court put it, is "an awesome" decision, there is an enhanced need for the reliability of fact finding. Thus, the argument goes, hearsay evidence not subject to an evaluation of reliability by the presentence investigator should not be used because the opportunity to respond to it, by cross-examination or otherwise, is not as great as would be the case at trial. This position ignores the constitutionally sufficient assurances of reliability built into the statute. It also ignores the circumstance that the defendant is put on an even footing with the state and may also offer hearsay evidence to rebut or explain what has been offered by the state. In this particular, the state's procedure is much more beneficial to the defendant than to the state. The state continues to have the burden of proof at sentencing, and when the defendant is able to rebut the state's case with hearsay evidence he has been given an easier time of it than he had at trial. Moreover, as the court observed in *Williams*, the elimination of hearsay from the sentencing proceeding would virtually cause the collapse of the entire system. It is not possible or practical to put before the court all of the relevant information it needs to have in order to make a rational sentencing decision if witnesses must be called to the courtroom to establish every evidentiary fact, including those that were established at trial. The social cost of such a rule is not irrelevant. *See, Spaziano v. Florida*, 468 U.S. 447 (1984).

The Idaho Court's holding not only creates the potential for arbitrary sentencing by excluding relevant facts, it does so also by leaving it to the presentence investigator, instead of the trial judge, to make determinations about

the reliability of hearsay evidence. The court has held that hearsay evidence will be excluded unless it has been made part of a presentence report and the presentence investigator believes the evidence to be reliable. The potential for arbitrariness inherent in this scheme is significant and would greatly impact the capital sentencing statutes of other states where this precedent to be followed elsewhere. For this reason, the Court should review the Idaho Court's holding.

IV

THE IDAHO SUPREME COURT'S HOLDING THAT ALL MITIGATING EVIDENCE MUST BE SEPARATELY WEIGHED AGAINST EACH INDIVIDUAL AGGRAVATING FACTOR IS INCONSISTENT WITH FEDERAL LAW

The decision of the Idaho Supreme Court is inconsistent with those of this Court and conflicts with decisions of courts of other states. As is the case with the Idaho court's hearsay evidence holding, its balancing formula limits the state's ability to avoid a capricious sentencing system.

This Court has held that a sentence of death that rests on one statutory aggravating factor need not be reversed even if additional factors are found to be invalid on appeal. *Zant v. Stephens*, 462 U.S. 862 (1983). The Idaho Supreme Court has previously held that once the sentencing threshold is crossed by the finding of a statutory aggravating factor "it is within the sentencer's discretion to balance aggravating and mitigating circumstances, not pursuant to any special standard." *State v. Sivak*, 674 P.2d 396 (1983), *cert. denied*, 468 U.S. 1220 (1984). *See, also, Zant v. Stephens, supra.*

As the state argued to the Idaho Supreme Court, resort to a sentencing system involving the balancing of statutory aggravating factors against mitigation is an incident of federal constitutional law. *Gregg v. Georgia, supra, Godfrey v. Georgia, supra, Lockett v. Ohio, supra.* The finding of statutory aggravating factors begins the inquiry into whether the death sentence shall be imposed. After that point, the court must have some discretion to apply factors of leniency, *Lockett, supra.* Within those strictures, a state has discretion to structure its system in its own way *Cabana v. Bullock,* 474 U.S. 376 (1986).

The Idaho statute provides that "where the court finds a statutory aggravating circumstance, the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust." I.C. § 18-2515(c).

What is called for by the statute is a simple, commonsense judgment by the trial court, whether, given the presence of a statutory aggravating factor, there is nonetheless sufficient extenuation that the death sentence should not be imposed. In *People v. Melton,* 750 P.2d 741 (Cal. 1988), the Supreme court of California referred to this process as one that was normative, not mechanical. Rather than accept this straight-forward approach, the Idaho Supreme Court has formulated a "weighing" process that is almost impossible to apply in any principled way. The sentencing authority is told that all of the mitigation must be weighed against each aggravating factor, as though it were possible to somehow assign objective weight to both mitigating and aggravating circumstances.

The difficulty with this is that no one knows how much a particular mitigating circumstance weighs. Assume, for example, the trial court were to find that the murder was especially atrocious and cruel and was also committed during the course of a robbery. If the defendant were youthful and had only a non-violent criminal record, it would be necessary to weigh these mitigating factors separately against each aggravating factor. How is this to be done? Does the sentencing judge merely say: "I have weighed mitigating factors against each aggravating factor separately" and let it go at that? If that is the answer, this case was allowed to turn on a mere formalism. If, on the other hand, some particular weight is to be ascribed to mitigating factors – something the statute does not attempt to do – the Idaho court has not told anyone how much weight is to be assigned to such factors, and there is no practical way to apply them in uniform fashion. In effect, the court has introduced an element of arbitrariness into the weighing process. *People v. Hernandez*, 763 P.2d 1289 (Cal. 1988) (it is the quality of the various factors that governs, not a "count and measure" formula.)

By its decision, the court has not only departed from what is required by federal law, it has impaired the state's ability to follow the requirements of federal law by needlessly confusing the sentencing process in a way that is almost sure to lead to erratic and inconsistent sentencing results.

CONCLUSION

The Idaho Supreme Court has misinterpreted *Booth v. Maryland, supra* and thereby made it more difficult to avoid arbitrariness in the capital sentencing process. The court's holdings limiting the use of hearsay evidence in capital sentencing proceedings and mandating an arbitrary formula for weighing aggravating and mitigating evidence likewise impair the state's ability to base death sentencing decisions on all the facts and to do so in a principled manner. This Court should grant certiorari and vacate the judgment of the Supreme Court of Idaho.

Respectfully submitted,

JIM JONES
Attorney General of
the State of Idaho

LYNN THOMAS
Solicitor General
Statehouse, Room 210
Boise, Idaho 83720
Telephone: (208) 334-2400
Counsel of Record

Attorneys for Petitioner

APPENDIX

1989 Opinion No. 44

IN THE SUPREME COURT OF THE STATE OF IDAHO

Nos. 16339 and 16741

THE STATE OF IDAHO, Plaintiff-Respondent. v. JAIMI DEAN CHARBONEAU, Defendant-Appellant,	Boise, November 1988 Term Filed: April 4, 1989 Frederick C. Lyon, Clerk

Appeal from the district court of the Fifth Judicial District of the State of Idaho, in and for the County of Jerome. Honorable Phillip M. Becker, District Judge.

Review of death sentence and appeals from conviction of first degree murder and from denials of applications for post-conviction relief. *Conviction affirmed; sentence vacated; remanded for resentencing.*

Greg J. Fuller, of Jerome, Idaho, attorney for appellant.

Hon. Jim Jones, Attorney General; Lynn E. Thomas, Solicitor General, of Boise, Idaho, attorneys for respondent. Mr. Thomas argued.

JOHNSON, J.

This is a first degree murder case that comes to us for review of a death sentence pursuant to I.C. § 19-2827 and on appeal from the conviction and from denial of applications for post-conviction relief. We affirm the conviction

but vacate the sentence and remand the case to the trial court for resentencing.

I.

THE BACKGROUND AND PRIOR PROCEEDINGS

Jaimi Dean Charboneau (Jaimi) was convicted of the first degree murder of his former wife, Marilyn Arbaugh (Marilyn). Jaimi was sentenced to death for this crime. The trial court twice denied post-conviction relief.

Jaimi and Marilyn lived together for approximately two years before they were married in June 1983. Marilyn had two teenage daughters, Tiffnie and Tira. The relationship between Jaimi and Marilyn was stormy. There is evidence that Jaimi physically abused Marilyn. In August 1983 Marilyn shot Jaimi with a .22 caliber pistol during a dispute. An aggravated battery charge was filed against Marilyn but was subsequently dismissed on the motion of the prosecuting attorney. In the spring of 1984 Marilyn filed for divorce. A default judgment was granted on June 13, 1984. There is evidence that Jaimi and Marilyn continued to see each other and were sometimes intimate after the divorce.

On June 21, 1984, Jaimi went to the cafe where Marilyn worked. They left in Marilyn's car. There is some dispute whether Marilyn went with Jaimi voluntarily. The next day Marilyn reported to the police that Jaimi had kidnapped and raped her and had stolen her car. There is evidence that Jaimi travelled to Nevada after June 21. The burned remains of Marilyn's car were found in southern Idaho in late June 1984. On June 25, 1984, Jaimi was

charged in Jerome County, Idaho with first degree kidnapping of Marilyn and grand theft of her car.

On June 28, 1984, Jaimi purchased a .22 caliber rifle from a hardware store in Gooding, Idaho. About midmorning on Sunday, July 1, 1984, Marilyn returned to her residence on a ranch near Jerome, after being gone since the evening before. Some time after 11:00 o'clock that morning Marilyn went out to check some horses in a corral near her home. Shortly after that Marilyn's daughter Tiffnie heard shots outside, grabbed Marilyn's .22 pistol, and went to see what had happened. She found her mother sitting on the ground in the barn with blood on her. Jaimi was standing close to Marilyn with a .22 caliber rifle pointed at Marilyn. Tiffnie asked Jaimi to leave and told him she was going to call the police. Jaimi told Tiffnie that he would take Marilyn to the doctor. Both Marilyn and Jaimi told Tiffnie to leave.

At 11:38 that morning Tiffnie called the Jerome County Sheriff's office and said that Jaimi had shot her mother. Tiffnie then told her sister Tira about the shooting, and they both got dressed. They heard more shots and ran outside where they hid behind a sheep wagon and called to their mother. Tiffnie had her mother's .22 caliber pistol with her, and it accidentally discharged behind her. She ran into the house, hid the gun, returned to the sheep wagon, and then ran to the barn. Tira followed close behind. Marilyn was lying on her back with her arms over her head. The girls ran back to call for an ambulance. At 11:42 a.m. Tira telephoned for assistance and reached the Jerome County Sheriff's office. She told them to get an ambulance and that her mother was dying. When the sheriff's deputies arrived at the scene, they

found Marilyn's body in the barn and located Jaimi in a field near the barn with a .22 caliber rifle lying nearby. Jaimi was arrested and charged with first degree murder. At the time of his arrest, Jaimi acknowledged that he had shot Marilyn, although he stated that he did so because she was going to shoot him.

The Jerome County public defender (the public defender) was appointed to represent Jaimi on the murder, kidnapping, and grand theft charges. Prior to a preliminary hearing on these charges, Jaimi's mother employed a private defense attorney (the defense attorney) to represent him. Following the preliminary hearing, Jaimi was bound over for trial on all three charges.

Jaimi told the defense attorney that he had not kidnapped or raped Marilyn and that he had not stolen her car. He stated that he and Marilyn had maintained a close and intimate relationship after their divorce, that she had been with him voluntarily on June 21 and 22, 1984, and that they had had consensual sexual intercourse on that occasion. He said that he had purchased the .22 caliber rifle as a present for Tira and on June 28, 1984, had taken it with him to the ranch where Marilyn and her daughters lived. He told the defense attorney that he and Marilyn had reconciled and were going to live together again, but that she wanted him to stay in the barn until she broke the news to her daughters. He said that he and Marilyn had sexual relations on the evening of June 30, 1984, and that she then left the ranch and did not return until the next morning.

Initially, Jaimi told the defense attorney that on the morning of July 1, 1984, Marilyn had taken the .22 caliber

rifle he had purchased for Tira into the house to remove a scope sight from it. He said that when she returned to the barn she loaded the rifle, pointed it at Jaimi, and pulled the trigger, but that it did not fire. Jaimi told the defense attorney that he grabbed the rifle from Marilyn and pulled the trigger several times while the rifle was on his hip and Marilyn was running away. He said that he closed his eyes while shooting. He said that after the shooting he took the rifle and fled to the nearby field.

Later, but prior to August 22, 1984, Jaimi told the defense attorney that after he fired the shots at Marilyn, instead of running directly out into the field, he had stayed around the end of the barn. He told the defense attorney that he heard Tiffnie talking to her mother and had looked around the corner. He said he saw Tiffnie holding a pistol in both hands pointed at Marilyn. Jaimi said that Tiffnie told Marilyn that Marilyn had screwed up their lives, ruined Tira's life, and was ruining Jaimi. He stated that he saw Tiffnie fire a shot from the pistol and saw Marilyn's hair fly up.

The defense attorney contends that based on this second version of the events of July 1, 1984, he tried to convince the prosecuting attorney to reinvestigate the crime. On August 23, 1984, he also discussed this version in a telephone conversation with his niece who was a psychic. Shortly after August 23, 1984, the defense attorney received a letter from his niece in which she reported having made contact with Marilyn through clairvoyance. The letter reported Marilyn's version of how she was killed. Among other things, the letter intimated that Marilyn's daughter had shot Marilyn after Jaimi had, because she couldn't stand to see her mother suffer.

The defense attorney was unable to convince the prosecuting attorney to dismiss the kidnapping and grand theft charges and to pursue the "second gun" theory. The defense attorney then filed a motion to dismiss the charges. At a hearing on this motion, the defense attorney called Jaimi to testify. The district judge carefully advised Jaimi that he could not be required to testify and gave the defense attorney an opportunity to explain fully to Jaimi his right to remain silent. Jaimi confirmed to the district judge that he understood that he had the right not to testify and that anything he said might be used as evidence against him. Jaimi was then sworn and testified.

In his testimony in support of the motion to dismiss Jaimi related fully the events concerning the alleged kidnapping and theft on June 21 and 22, 1984, as well as the events of July 1, 1984, surrounding Marilyn's death. He testified that when Marilyn came to the barn that morning she picked up the .22 caliber rifle and took it into the house to remove a scope sight that had come with it. He said that Marilyn told him that she was going to tell the girls that day that Jaimi was there and would let Tira take the gun to the gun range and let her sight it in. Jaimi told the court that when Marilyn came back to the barn she had a handful of bullets and loaded the rifle. He said that after going out to the corrals to move some horses, he and Marilyn returned to the barn. He said he asked Marilyn where she had been all night, and that she told him he thought she was sleeping with every guy in the valley. He stated that Marilyn picked up the rifle, pointed it at him, and told him that he was dead and that no other woman was going to have him. He said he heard a click, grabbed

the barrel of the rifle and wrestled it away from her. Jaimi testified that Marilyn screamed for Tiffnie to bring Marilyn's shotgun to her, and that when he got the rifle away from Marilyn, she turned around and ran. He said that he saw Tiffnie coming from the house, that he had the rifle at his hip, and that he thought Marilyn might be going to run around and get another gun. He said that he closed his eyes and that the gun went off several times. He opened his eyes and Marilyn was on her knees and bleeding. He said that Marilyn told Tiffnie to leave and that he told Tiffnie to call an ambulance. He testified that as he knelt beside Marilyn, Tiffnie came running toward them with a pistol saying, "I hate both of you guys." He said that Tiffnie fired the pistol two or three times and that he ran out of the barn. He stated that when he realized that Tiffnie was not coming after him he eased back to the barn and heard Tiffnie talking to her mother. He testified that he saw Tiffnie standing above her mother, heard the pistol go off, and saw Marilyn's hair fly up.

After the district judge denied the motion to dismiss, the defense attorney wrote a letter to the deputy attorney general who had been appointed as a special prosecutor in the case. In this letter the defense attorney set forth Jaimi's version of the events involved in the charges against him. He also sought to have the special prosecutor arrange for Jaimi to be given a polygraph examination and to make his own investigation of the charges. Subsequently, the defense attorney revealed to the special prosecutor all the evidence and information he had regarding the case and arranged for Jaimi to be interrogated by an investigator from the attorney general's office, without

the defense attorney being present. This interrogation took place and lasted over two hours. Jaimi divulged a great many more particulars concerning the alleged kidnapping, theft and murder.

On the motion of defense counsel venue was changed to Ada County and the three charges were consolidated for trial. The trial was scheduled to begin in Boise on April 15, 1985. On March 13, 1985, Jaimi indicated that he did not want the defense attorney to continue to represent him. The trial court allowed the defense attorney to withdraw and reappointed the public defender. Jaimi contended that the defense attorney had delegated too much of the investigation in the case to an investigator whom he described as "living in some kind of a fantasy world." Jaimi confirmed that it had been his desire to testify at the hearing on the motion to dismiss, that the decision to do so was a joint decision between him and the defense attorney, and that he agreed that was the best thing to do. Jaimi said he understood that if a new attorney was appointed to represent him, the trial would begin on April 15, 1984. He told the trial court that he wanted the trial to begin on that day. The trial court agreed that the defense attorney would be allowed to sit at counsel table with the public defender during the trial.

The trial began as scheduled on April 15, 1985. Before any evidence was received, the public defender moved to preclude the prosecution from using in any fashion Jaimi's statements during his testimony at the hearing on the motion to dismiss and during his interrogation by the investigator from the attorney general's office. The trial court denied the motion.

At the conclusion of the prosecution's case, the public defender moved to dismiss the kidnapping and theft charges on the ground that the court lacked jurisdiction, since there was no proof that the crimes occurred in Jerome County. The trial court agreed and dismissed the charges. The public defender then moved to strike all of the evidence that had been admitted relating to the kidnapping and theft cases. The court denied the motion on the ground that the evidence would have been admissible in the murder case in any event. The trial court informed the jury that the charges had been dismissed. The trial then proceeded on the murder charge.

Jaimi did not testify at the trial. The public defender chose not to call him. The public defender felt that Jaimi's testimony would be "nit picked" by the prosecution, because of the availability of Jaimi's version of the events surrounding Marilyn's death provided by Jaimi's testimony at the hearing on the motion to dismiss, by the defense attorney's letter to the special prosecutor, and by Jaimi's interrogation by the investigator for the attorney general. The defense presented on Jaimi's behalf was designed to convince the jury that Jaimi shot Marilyn but did not kill her, or, that if he did kill her, he did not intend to. The defense argued that the killing did not amount to first degree murder.

Among the instructions given to the jury by the trial court was one concerning lesser included offenses. This instruction included a provision that the jury "should consider the included offenses only in the event the state has failed to convince you beyond a reasonable doubt of the guilt of the accused with respect to the crime charged."

Following the jury's verdict that Jaimi was guilty of first degree murder, a presentence report was prepared and the trial court conducted sentencing hearings. At the time of these hearings, Jaimi was represented by another private defense attorney (the second defense attorney). At one of these sentencing hearings a letter written to the trial judge by Marilyn's father was admitted in conjunction with the father's testimony. This letter described the relationship between Jaimi and Marilyn, including Jaimi's physical abuse of Marilyn and the circumstances surrounding Marilyn's shooting Jaimi in August 1983. The letter also discussed Jaimi's violent nature, his harassment of the Arbaugh family after Marilyn's death, the lack of any likelihood that Jaimi could be rehabilitated, and hearsay statements that were adverse to Jaimi. The letter had not been submitted with the presentence report, but the presentence report contained some of the same information in the form of statements from Marilyn's parents. Mr. Arbaugh adopted the letter as part of his testimony at the sentencing hearing. The trial court admitted the letter and added, "taking into consideration that probably great portions of it may be hearsay and stimulated by some prejudice and sympathy, and I will take that into consideration when reviewing it." The prosecutor asked Mr. Arbaugh the following question: "Mr. Arbaugh, is there anything else you would like to say to the Court as to what you think ought to happen to Mr. Charboneau in view of the damage caused to your family by his actions?" In response, Arbaugh stated:

> Well, I think anyone that's been around him that, the last two years that he was loose, knows if he was ever on the street again that the Arbaugh family would be going through the same thing again.

> He's vowed to destroy the Arbaugh family, and you see what he done to start with. There's no doubt in my mind that he wouldn't try to kill the rest of us.

He gave his opinion that Jaimi should be put to death or given a fixed life sentence. The second defense attorney was given an opportunity to cross-examine Mr. Arbaugh.

Following the sentencing hearings, the trial court made findings concerning aggravation and mitigation and sentenced Jaimi to death. Among the facts found by the trial court was that at the time Tiffnie went to the barn after she heard the first shots fired on July 1, 1984, Marilyn's life "probably could have been saved if she had received the necessary medical attention." The trial court also found that within not less than two minutes after leaving the barn Tiffnie heard more shots. The trial court concluded:

> That after firing the first volly (sic) of shots the victim Marilyn Arbaugh was wounded but her life could have been saved if she had received necessary medical attention. At that moment the defendant, Jaimi Charboneau had a choice. He could have saved the woman he professed to love. However, with at least two minutes to give thought to the matter, the defendant, Jaimi Dean Charboneau, chose to fire additional shots into the wounded and helpless body of Marilyn Arbaugh. It appears from the facts that Jaimi Dean Charboneau acted intentionally, methodically and violently while he erased from the face of this earth the life of a human being.

The trial court found "beyond a reasonable doubt that the facts establish the statutory aggravating circumstances set forth in Idaho Code Section 19-2515 (g)(5) and 19-2515 (g)(6)." The trial court was "unable to find any mitigating

circumstances which would overcome or outweigh the aggravating circumstances."

The second defense attorney filed an application for post conviction relief, including claims of ineffective assistance of counsel. Following a hearing on this application, the trial court denied the post conviction relief.

Following the appointment of the second defense attorney to become a district judge, he was allowed to withdraw as Jaimi's attorney. The trial court then appointed another attorney (the second public defender) to represent Jaimi. The second public defender filed another application for post-conviction relief alleging, among other things, newly discovered evidence relating to ineffective assistance of counsel. The hearing on this application dealt with a claim that the defense attorney had relied on "supernatural, clairvoyant phenomena to dictate his strategy in defending Jaimi." The trial court found that the letter the defense attorney had received from his niece shortly after August 23, 1984, did not influence the manner in which the defense attorney defended the case. The trial court denied post-conviction relief.

This Court has before it the mandatory review of Jaimi's death sentence, together with appeals from his conviction and from the denials of post-conviction relief. There are a plethora of issues involved in this case. We will address each of them in turn.

II.

DID CHARBONEAU RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL?

A. The standards.

1. Federal.

This Court has recently restated the test for determining whether a defendant has been denied effective assistance of counsel under the Constitution of the United States: "First, a claimant must prove that counsel's performance was deficient. Second, a claimant must show that this deficient performance prejudiced his or her case. [Citing *Strickland v. Washington*, 466 U.S. 668, 680, 104 S.Ct. 2052, 2064, 80 L.Ed. 674, 686 (1984)]" *Aragon v. State*, 114 Idaho 758, ___, 760 P.2d 1174, 1176 (1988).

In *Aragon* this Court also pointed out that "there is a strong presumption that counsel's performance falls within the 'wide range of professional assistance,'" and that "the defendant bears the burden of proof to show that 'counsel's representation fell below an *objective* standard of reasonableness.'" *Id.* at ___. Unless prejudice is presumed, "the defendant must affirmatively prove prejudice." *Id.* at ___. Prejudice is presumed only in cases such as "where the defendant is denied counsel altogether, or where counsel represents conflicting interests." *Id.* at ___.

2. State.

In *Aragon* this Court cited *Gibson v. State*, 110 Idaho 631, 635, 718 P. 2d 283, 287 (1986) for the proposition that " 'the Idaho Constitution potentially can be read to afford a broader right to effective counsel than does the federal Constitution.' " The Court then opined:

> To date that has not taken place. However, as noted in *Gibson*, we have not yet been required to define the differences between the rights afforded by federal and state constitutions. [Citation omitted.] Nor are we required to do so here. Our review of the record persuades us that the district court did not err in concluding that Aragon failed to establish that counsel's conduct contributed to the conviction.

114 Idaho at ___, 760 P..2d at 1177.

From *Aragon* we are bound to conclude that it remains the burden of one claiming ineffective assistance of counsel under the Idaho Constitution to prove that "counsel's conduct contributed to the conviction."

The starting point in evaluating counsel's conduct under the state constitution remains the American Bar Association's standards entitled "The Defense Function." (The ABA standards). *Aragon*, 114 Idaho at ___, 760 P.2d at 1177.

B. The issues.

1. Jaimi's testimony at the motion to dismiss hearing.

Reviewing Jaimi's testimony at the hearing on the motion to dismiss does not convince us that this testimony proves that he was denied effective assistance of counsel. While any of us in hindsight might conclude that Jaimi should not have testified at the hearing and given the prosecution five months to investigate the story he told, looking at the case as a whole, we cannot say that Jaimi has proved that the reliability of the result at trial would have been different if he had not testified at the hearing.

At the hearing Jaimi testified that Tiffnie had shot Marilyn with Marilyn's pistol after Jaimi had left the barn. Jaimi has continued to assert this version even after his conviction and even after his sentencing. Presumably this is the version that he would have told, if he had testified at trial. It was Jaimi's choice whether to testify at trial. The public defender advised him not to, and Jaimi accepted this advice. We can only speculate whether his testimony would have been impeached and whether the jury would have believed his testimony. It is Jaimi's burden to prove that the reliability of the result has been affected because he testified at the hearing on the motion to dismiss. We are not convinced that the reliability of the result was affected.

The premise of the claim of ineffective assistance of counsel with regard to Jaimi's pretrial testimony is that the defense attorney placed Jaimi on the stand without any legitimate reason or purpose. While it may not have been the game plan that other attorneys would have followed, we may not second guess counsel's strategic and tactical choices. *Aragon*, 114 Idaho at ___, 760 P.2d at 1177. The defense attorney testified in conjunction with the post-conviction relief proceedings that he knew the murder case was going to trial. He said that his objective in having Jaimi testify at the hearing on the motion to dismiss was to "embarrass the prosecutor into looking to the true facts" of the kidnapping and grand theft cases. The defense attorney disavowed any anticipation that the murder charge would be dismissed. Despite this stated lack of anticipation during the hearing on the motion to dismiss, the defense attorney questioned Jaimi in detail about the events leading to Marilyn's death on July 1,

1984. He also argued to the district judge that the murder charge should be dismissed on the ground that there was not sufficient evidence submitted at the preliminary hearing to support a finding of probable cause. While this inconsistency is troubling to us, we are unable to conclude that the defense attorney failed to render effective assistance of counsel to Jaimi concerning the pretrial testimony.

When confronted with the defense of serious felony charges such as those in this case, defense counsel may have to rely on creative and sometimes risky tactics to secure the best possible result for a defendant. We are not prepared to say that the decision to have a defendant testify in a pretrial proceeding is sufficient to indicate ineffective assistance of counsel. We find nothing in the American Bar Association's standards relating to "The Defense Function" that would indicate a deficiency of the defense attorney in calling Jaimi as a witness at the hearing on the motion to dismiss.

Three experienced and respected criminal defense attorneys testified at the first post-conviction proceeding that it was not competent representation for the defense attorney to have called Jaimi as a witness at the hearing on the motion to dismiss. These attorneys also testified that other actions of the defense attorney constituted incompetent representation. While we are respectful of the opinions of these attorneys, it is for us to determine in each case whether the constitutional mandate of effective assistance of counsel has been fulfilled. The question is one of law and not one of fact.

2. Divulging information and evidence to special prosecutor.

The letter of the defense attorney to the special prosecutor that was written after the hearing on the motion to dismiss, together with the conversation of the defense attorney with the special prosecutor, divulged all of the information and evidence that the defense attorney and his investigator had developed about the case. While other attorneys might not have pursued this course, we are not persuaded that this constituted a violation of Jaimi's right to effective assistance of counsel.

The defense attorney's stated purpose in divulging the information and evidence was to convince the special prosecutor to conduct an independent investigation. The defense attorney believed that if the special prosecutor and his investigators would pursue this investigation they would conclude that Jaimi was telling the truth and the cases would be resolved favorably. This may seem like a naive plan to those looking back now, but it is apparent that at the time, the defense attorney was convinced that this was the best course of action. He testified later that he wanted a polygraph examination of Jaimi and hoped that the special prosecutor would be persuaded by the investigation to give Jaimi the examination at state expense. He stated that resources were not available to him to have the examination otherwise. He stated that he did not believe that the district judge would have granted Jaimi the right to have a polygraph examination at county expense.

Even though divulging this information and evidence by the defense attorney did not produce the result the defense attorney wanted, we are not persuaded that it

was ineffective assistance for the defense attorney to have tried this tactic. There is no portion of the ABA standards that prohibits disclosures such as these by a defense attorney. It is true that Standard 4-3.1 requires that "the lawyer should explain the obligation of confidentiality which makes privileged the accused's disclosures relating to the case." Here, Jaimi had already testified to his actions in relationship to the charges. The defense attorney divulged nothing new about Jaimi's version. The other information and evidence divulged by the defense attorney was the result of investigation by the defense attorney and his investigator, not what Jaimi had told them.

3. Jaimi's interrogation by the investigator.

The interrogation of Jaimi by the investigator from the attorney general's office was merely an extension of the plan that the defense attorney had initiated by divulging the information and evidence that were contained in his letter to the special prosecutor and his conversation with the special prosecutor and his investigators. We are not persuaded that allowing Jaimi to be interrogated by the investigator without counsel being present constituted ineffective assistance of counsel.

The defense attorney testified in the first post-conviction proceeding that he discussed the interrogation with Jaimi before it occurred, that he explained Jaimi's right to remain silent, and that Jaimi agreed that he should submit to the interrogation.

4. Failure to apply for funds to assist in the defense and failure to employ experts.

The defense attorney did not apply to the trial court for funds to investigate or to employ experts. No facts are asserted that would have been discovered by additional investigation. No expert testimony is offered that could have been produced if funds had been sought from the trial court. In the absence of this proof, we find no evidence of ineffective assistance of counsel on these grounds.

5. Inadequate investigation.

The defense attorney employed an investigator whom the defense attorney later described as a "flake." Jaimi now complains that the defense attorney did not investigate the charges thoroughly enough. Standard 4-4.1 of the ABA standards sets out the defense attorney's duty to investigate the circumstances of Jaimi's case. Jaimi has not presented any evidence in order to substantiate that an inadequate investigation affected the outcome of the case.

6. Inadequate preparation for trial and failure to request continuance.

The public defender was appointed to replace the defense attorney approximately three weeks prior to trial. The public defender testified at the first post-conviction proceeding that he found that the case was not prepared for trial. He stated that he should have requested that the trial court vacate the trial to allow him to investigate the case further and to prepare for trial. No evidence has been offered as to what new facts or defenses could have

been developed if the trial had been continued and further preparation conducted.

7. Consolidation of cases.

The defense attorney sought and obtained the consolidation of the trials on the three charges on the premise that it would be to Jaimi's advantage to have all the facts concerning the events from June 21 through July 1, 1984, presented to the jury. Although many defense attorneys might not agree with this approach, we are not prepared to say that this choice amounted to ineffective assistance of counsel.

In his testimony at the first post-conviction proceeding the defense attorney described his reason for seeking the consolidation:

> Well, . . . they were all so interrelated that the only way that we could show that it was really the intent of Marilyn to murder Jaimi, rather than the other way around, that and from what Jaimi had told us that he had wrestled the gun, that she pointed the rifle at him and pulled the trigger, but it didn't go off, and that he took the gun away from her, and then is when she went dancing down the hall and when he shot her, and none that of (sic) would have had any meaning to the jury at all unless they had the whole scenario which would include the phoney (sic) rape allegation and the phony kidnap allegation.

He also testified that he discussed the motion with Jaimi before it was made.

Standard 4-5.2 of the ABA standards provides that the only decisions that must be made by the accused after full consultation with counsel are what plea to enter,

whether to waive jury trial, and whether to testify. This standard states:

> (b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client.

There was no obligation for the defense attorney to leave the decision on whether to request consolidation to Jaimi. We will not second guess the decision.

8. Reliance on clairvoyance.

In the decision on the second application for post-conviction relief the trial court found that none of the evidence directly established that the letter the defense attorney received from his niece about her clairvoyant contact with Marilyn had any influence on the manner in which the defense attorney defended the case. Our review of the record confirms this finding. Jaimi claims that the defense attorney relied upon his niece's clairvoyant contact with Marilyn and, therefore, did not investigate any alternative defenses. Standard 4-4.1 of the ABA standards sets out the defense attorney's duty to investigate the circumstances of Jaimi's case. We conclude that this standard was not violated. The discussion of the defense attorney with his niece concerning Tiffnie's participation in the death of her mother occurred after Jaimi had related his new version of the facts to the defense attorney. There is no evidence to support the supposition that Jaimi's new version implicating Tiffnie was provoked by the clairvoyance of the defense attorney's niece or the defense attorney's belief in it. In the absence of such

evidence we are not prepared to use reliance on clairvoyance as a basis for ineffective assistance of counsel.

9. Failure to have psychological or psychiatric examination.

Jaimi asserts that the public defender or the defense attorney should have advised him about being examined by a psychiatrist or a psychologist before trial. No evidence is offered that would establish any defense for Jaimi through such expert testimony. The psychologist who examined Jaimi after his conviction and who testified in conjunction with the sentencing did not offer any opinion that would excuse the killing. His testimony indicated only that there was some possibility that Jaimi could be rehabilitated. We are unable to conclude that the failure to have Jaimi examined before the trial constituted ineffective assistance of counsel.

10. Excessive use of alcohol.

Jaimi contends that the defense attorney came to his cell on many occasions when the defense attorney was under the influence of alcohol. Even if we assume these allegations are true, no evidence is offered to show in what way this affected the defense attorney's representation of Jaimi.

11. Failure to object to evidence and to request mistrial.

The prosecutor referred in his opening statement to two "hot" checks that Jaimi had reportedly written in Battle Mountain, Nevada. When the checks were offered, the public defender objected, and the checks were not admitted. Jaimi argues that the failure of the public defender to object to the statement of the prosecutor and

to move for a mistrial constituted ineffective assistance of counsel. We cannot agree. No connection is made between the checks and the murder. We must assume that the jury followed the instructions of the trial court and made its judgment in the case based on the evidence presented and not on statements of counsel concerning evidence that was not connected with the homicide.

12. Failure to request a new trial.

Jaimi asserts that the public defender should have moved for a new trial. No basis for such a motion is suggested. We find no basis for supporting an ineffective assistance of counsel claim on this ground.

AS TO PART II: SHEPARD, C.J., BAKES and HUNTLEY, JJ., concur. BISTLINE, J., dissents.

III.

WAS THE LESSER INCLUDED OFFENSE INSTRUCTION ERRONEOUS?

Jaimi asserts that the trial court erred in giving the jury Instruction No. 15, concerning lesser included offenses. This instruction stated:

> The law permits the jury to find the defendant guilty of any lesser offense which is necessarily included in the crime charged in the Information, whenever such a course is consistent with the facts found by the jury from the evidence in the case, and with the law as given in the instructions of the Court.
>
> When you are deliberating with respect to each count, you should first consider the crime charged. You should consider the included offenses only in the event the State has failed to convince you beyond a

reasonable doubt of the guilt of the accused with respect to the crime charged.

The jury will bear in mind that the burden is always upon the Prosecution to prove beyond a reasonable doubt every essential element of any lesser offense which is necessarily included in any crime charged in the Information; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Jaimi argues that the second sentence of the second paragraph of this instruction required the jury to agree unanimously to acquit Jaimi of first degree murder before they could consider any lesser included offenses. In support of this position Jaimi presents the instruction given by the trial court which states: "The verdict reached in this case must be unanimous, that is, you must agree unanimously as to whether the defendant is guilty or not guilty as regards any offense." *State v. Korbel*, 231 Kan. 657, 647 P.2d 1301 (1982) is cited as a basis for Jaimi's position on the error asserted. We find no error in the instruction given on lesser included offenses.

The major premise of the argument that Instruction No. 15 was erroneous is that the words "failed to convince you beyond a reasonable doubt" would be interpreted by the jury to mean "if you unanimously agree." The fallacy in this major premise is that the words "failed to convince you beyond a reasonable doubt" could reasonably only be interpreted by the jury to mean "if you cannot agree." These are precisely the words that the Kansas Supreme Court found to cure any problem with the instruction that was at issue in *Korbel*.

Instruction No. 15 allowed the jury to consider lesser included offenses if they could not agree that Jaimi was guilty of first degree murder. That was a correct statement of the law. We note that in *State v. Gilman*, 105 Idaho 891, 673 P.2d 1085, (Ct. App. 1983) *rev. den.* (1984) our Court of Appeals considered an instruction relating to lesser included offenses. The comparable language in the instruction at issue there was: "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of [the offense charged], you may still find him guilty of any such lesser offense . . . ." *Id.* at 897, 673 P.2d at 1091. While the point at issue in *Gilman* was not the same as presented here, our Court of Appeals did not question the propriety of this portion of the instruction. We denied review of the case. We are reinforced in our conclusion here by the implicit approval of this similar language in the instruction in Gilman.

AS TO PART III: SHEPARD, C.J., BAKES, BISTLINE and HUNTLEY, JJ., concur.

IV.

FAILURE TO SUPPRESS USE OF JAIMI'S TESTIMONY AT THE HEARING ON THE MOTION TO DISMISS AND HIS STATEMENTS IN THE INTERVIEW WITH THE INVESTIGATOR FOR THE ATTORNEY GENERAL.

Jaimi asserts that the trial court erred when it refused to suppress the use of the testimony he gave at the hearing on the motion to dismiss and the statements he

made in his interview with the investigator for the attorney general's office. The motion to suppress was presented to the court before the receipt of any evidence in the trial of this case. In denying the motion the trial court stated:

> Well, my ruling will be as follows, and for the record I want to make it clear why I am ruling the way I am. As I related to you last evening at the conclusion of your motion, at the time we had the motion to dismiss hearing and at which time Mr. Charboneau did testify, I was very careful, I feel, in admonishing the defendant and advising him of his right to remain silent, that he did not have to testify, that if he did testify that anything he may say, that he would say, may later be used against him. We went into a second day on that hearing, and again on the second day I admonished him. I don't know what else you can do. I think he has the right if he so desires to waive his right to remain silent. He has the right to take the witness stand. He has the right to give testimony. In this motion he wants me to suppress it because he waived his right to remain silent and made a statement.
>
> And it's interesting for the record to note that Mr. Charboneau through counsel filed a lawsuit in Jerome County in a habeas corpus action alleging that we were violating his First Amendment right to freedom of speech. And a similar action involving Mr. Charboneau against the Sheriff of Jerome County is pending in Federal Court again alleging that he's violated Mr. Charboneau's right to freedom of speech, his First Amendment right. So it's a little inconsistent when on one hand you're complaining that his rights to remain silent were violated because he waived that right and took the stand, and then on the other hand he's complaining because we are violating his rights to freedom of speech. Inconsistent.

> That's a lengthy way to get to my ruling, but I want it as a matter of this record so that in review of this matter the higher court will know why I am ruling the way I am. The motion is denied. The State has the right to use the testimony from that hearing on the motion to dismiss, and the State has the right to use the interview between the defendant and Mr. Carr in all respects.

The record of the hearing on the motion to dismiss indicates that Jaimi was given ample advice both by the district judge and by the defense attorney of his right to remain silent. The interview between Jaimi and the investigator for the attorney general's office took place at the request of the defense attorney. Jaimi consented to talk with the investigator, was advised of his constitutional rights before the interview, and waived those constitutional rights.

To the extent that the State relied at the trial on any of Jaimi's testimony at the hearing on the motion to dismiss or his statements to the investigator for the attorney general's office there was no violation of Jaimi's rights. In fact, the record indicates that at trial the State did not attempt to rely on Jaimi's testimony at the hearing and used only a very minor portion of his statements to the investigator.

AS TO PART IV: SHEPARD, C.J., BAKES, BISTLINE and HUNTLEY, JJ., concur.

V.

WAS PREJUDICIAL EVIDENCE ADMITTED ENTITLING JAIMI TO A NEW TRIAL?

Jaimi asserts that the trial court admitted inadmissible prejudicial evidence entitling Jaimi to a new trial.

While it is not entirely clear from the brief filed on Jaimi's behalf, the following are apparently the items of evidence that are referred to in this issue:

> Pictures of Marilyn's two children.
>
> Pictures of Marilyn's vehicle showing the vehicle identification numbers had been either totally or partially removed.
>
> Testimony of Marilyn's boyfriend as to statements Marilyn made on June 30, 1984, regarding Jaimi.

The record indicates that the only motion for new trial filed on behalf of Jaimi related to newly discovered evidence. In the absence of a motion for new trial on the basis of the allegedly inadmissible prejudicial evidence, there is no proper basis to bring this issue before this Court. In any event, we see no error in the trial court's admission of the evidence questioned in this issue. The only portion of this evidence that raises any question of impropriety is the testimony of Marilyn's boyfriend who was out with her the night before her death. The defense offered evidence of the relationship of Marilyn and Jaimi up to the time of her death. In rebuttal the State offered the testimony of the boyfriend as to statements made to him by Marilyn the night before her death about her relationship with Jaimi. The boyfriend's testimony indicated that Marilyn told him she was worried because she did not know where Jaimi was. That testimony was admissible under I.R.E. 803, as evidence of her existing state of mind.

AS TO PART V: SHEPARD, C.J., BAKES, BISTLINE and HUNTLEY, JJ., concur.

VI.

FAILURE TO STRIKE EVIDENCE OF GRAND THEFT AND KIDNAPPING AFTER DISMISSAL OF THOSE CHARGES.

Jaimi asserts that the trial court erred by failing to strike from the record all evidence pertaining to the grand theft and kidnapping charges after those charges had been dismissed for lack of jurisdiction. At the time the trial court denied the motion to strike this evidence, the district judge stated that the evidence pertaining to the grand theft and kidnapping would have been admissible, even if those charges had not been filed and consolidated with the first degree murder charge. The district judge stated: "This thing occurred over a period of some ten or twelve days and I think the jury needs the benefit of all of that testimony in order to properly arrive at a decision, whichever way they decide." We agree.

I.R.E. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In *State v. Needs*, 99 Idaho 883, 892-93, 591 P.2d 130, 139-40 (1979) this Court approved the admission of evidence that two weeks prior to the homicide the defendant assaulted the victim with a butcher knife on the grounds that the evidence of this assault tended to show the defendant's motive or intent. We believe the same is true of the evidence of the kidnapping and grand theft here.

The circumstances of these acts indicated the hostility of Jaimi toward Marilyn.

AS TO PART VI: SHEPARD, C.J., BAKES and HUNTLEY, JJ., concur.

BISTLINE, J., dissents.

VII.

WAS THE EVIDENCE SUFFICIENT TO SUPPORT THE VERDICT?

Jaimi asserts that there was not sufficient evidence to support the verdict of the jury. We disagree.

As this Court has pointed out in another recent first degree murder case where this same issue was presented:

> In analyzing appellant's contention, the appropriate standard of review is whether there is substantial competent evidence to support the jury's verdict. [citations omitted] Our function on appeal is to examine the supporting evidence, not to place ourselves in the jury's position or reweigh the significance of evidence as it relates to specific elements. [Citations omitted.] On appeal, all facts, and inferences to be drawn from those facts, are construed in favor of upholding the lower court decision.

State v. Aragon, 107 Idaho 358, 366, 690 P.2d 293, 301 (1984).

The evidence in this case, together with the inferences that the jury could have drawn from that evidence, provide a sufficient basis for the verdict of the jury. Jaimi had previously perpetrated several acts of violence toward Marilyn. He had also made threats to kill her. He purchased the rifle a few days before Marilyn's death.

Shortly before Marilyn's death Tiffnie heard shots. When she went to the barn to investigate, Tiffnie observed Jaimi holding a rifle pointed at Marilyn as Marilyn sat wounded on the ground. A short time later, Tiffnie and Tira heard more shots and found their mother apparently dead. Jaimi was found by the investigating officers in a nearby field with the rifle lying nearby. At the time of his apprehension Jaimi acknowledged to the arresting officers that he had shot Marilyn. These facts and the inferences were sufficient for the jury to find that Jaimi unlawfully killed Marilyn with malice aforethought, wilfulness, deliberation, and premeditation. *State v. Warden*, 100 Idaho 21, 592 P.2d 836 (1979).

AS TO PART VII: SHEPARD, C.J., BAKES and HUNTLEY, JJ., concur.

BISTLINE, J., expresses no opinion.

VIII.

POST-CONVICTION HEARINGS.

A. The first hearing.

Jaimi asserts that the findings of fact and conclusions of law of the trial court after the first post-conviction hearing were erroneous. This hearing dealt with the alleged ineffective assistance of counsel. We have reviewed the findings of fact in light of the evidence submitted at the hearing and find that these findings were supported by substantial competent evidence. The conclusions of law announced by the trial court are consistent with our conclusions here as to the ineffective

assistance of counsel based on the facts submitted at the hearing. We find no error in them.

B. The second hearing.

1. Failure to consider evidence.

At the second post-conviction hearing the trial court limited the evidence to matters that were not presented on the original application for post-conviction relief. At the hearing the primary issue that was addressed was the purported reliance of the defense attorney on clairvoyance in preparing Jaimi's defense. The public defender also testified regarding his state of preparation before trial and how the errors of the defense attorney prejudiced his ability to defend Jaimi. Jaimi asserts that the trial court failed to consider the testimony of the public defender at this hearing.

The transcript of the second post-conviction hearing reveals that the trial court allowed testimony of the public defender relating to matters that were considered at the first hearing "for foundation purposes in order to make more clear [the] testimony in this matter." The trial court stated definitely that it was not going back and adjudicating any of those issues that it had already ruled on in the original application. The second defense attorney stated to the trial court that he did not intend to relitigate those issues, "but rather to show how those issues affected the trial stage of this case." The trial court then commented:

> For guidance, counsel, I will agree with you, that if you are going to proceed on this amended application for post-conviction relief, alleging that the defendant's Sixth Amendment rights were violated, you do

> have to show not only that they were violated but how they affected the trial of this case, so I would allow you to show that and, likewise, go back into it. ... But I'm not going to relitigate any of those other issues.

In the findings of fact and conclusions of law rendered by the trial court after the second post-conviction hearing, the trial court stated that the only new issue raised concerned a claim that the defense attorney relied "on supernatural, clairvoyant phenomena to dictate his strategy in defending Jaimi Charboneau and, therefore, allegedly rendered ineffective the assistance of counsel provided by [the defense attorney]."

We conclude from this record that the trial court did not intend to consider the testimony of the public defender that went beyond this new issue, except by way of background. We agree that this was proper. Essentially, Jaimi contends that the trial court failed to consider the effect that the defense attorney's reliance on clairvoyance had on the public defender's ability to render effective assistance to Jaimi in the trial. The fallacy in this position is that in its findings and conclusions after the second post-conviction hearing the trial court concluded that clairvoyance played no part in the strategy for Jaimi's defense developed by the defense attorney. Therefore, we conclude that there was no basis for the trial court to rule that this strategy affected the public defender's defense of Jaimi.

2. Were the findings and conclusions erroneous?

Jaimi asserts that the findings of fact and conclusions of law rendered by the trial court after the second post-conviction hearing were erroneous. We have reviewed

those findings and conclusions. The findings of fact are supported by substantial competent evidence. The conclusions of law are in concurrence with our own conclusions contained in this opinion concerning the relationship of clairvoyance to the effective assistance of counsel.

AS TO PART VIII: SHEPARD, C.J., BAKES and HUNTLEY, JJ., concur.

BISTLINE, J., expresses no opinion.

IX.

SENTENCING.

A. Participation of jury.

Jaimi asserts that the imposition of the death penalty with no participation by the jury in the sentencing process violates the sixth, eighth, and fourteenth amendments to the Constitution of the United States. He also contends that the sentence was unconstitutional because he was denied a jury determination of the aggravating circumstances enumerated in I.C. § 19-2515(g).

In 1983 this Court held "that there is no federal constitutional requirement of jury participation in the sentencing process and that the decision to have jury participation in the sentencing process, as contrasted with judicial discretion sentencing, is within the policy determination of the individual states." *State v. Creech*, 105 Idaho 362, 373, 670 P.2d 463, 474 (1983) *cert. den.* 465 U.S. 1051, 104 S.Ct. 1327, 79 L.Ed.2d 722 (1984). *See also State v. Sivak*, 105 Idaho 900, 902, 674 P.2d 396, 398 (1983) *cert. den.* 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed.2d 887, (1984); *State v. Fetterly*, 109 Idaho 766, 710 P.2d 1202 (1985)

cert. den., 479 U.S. 870, 107 S.Ct. 239, 93 L.Ed.2d 164 (1986); *State v. Fain*, Slip Op. No. ___ (released today). In 1984 the United States Supreme Court upheld death sentencing by trial judges. *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

This Court has also held "that Art. 1, § 7, of the Idaho Constitution does not require the participation of a jury in the sentencing process in a capital case." *Sivak*, 105 Idaho at 904, 674 P.2d at 400. *See also Fain*, Slip Op. No. ___ (released today).

Jaimi contends that despite these decisions, since I.C. § 19-2515(g) "links an enhanced punishment to specific enumerated factual findings," it "usurps the jury's fundamental role in deciding whether the fact is so." In *Richmond v. Arizona*, 434 U.S. 1323, 98 S.Ct. 8, 54 L.Ed.2d 34 (1977) *reh. den.*, 434 U.S. 812, 98 S.Ct. 49, 54 L.Ed.2d 69 (1977) Justice Rehnquist, sitting as a circuit justice, denied an application for suspension of an order denying certiorari or, in the alternative, for a stay of execution. In his opinion Justice Rehnquist stated:

> Applicant raises a second argument in his petition for rehearing that was not raised either before the Arizona Supreme Court or in his earlier petition for certiorari. Applicant argues that the Arizona statute violates the Sixth, Eighth, and Fourteenth Amendments in failing to provide for jury input into the determination of whether aggravating and mitigating circumstances do or do not exist. Such jury input would not appear to be required under this Court's decision in *Proffitt* [*v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)].

434 U.S. at 1325, 98 U.S. at 9, 54 L.Ed.2d at 36. Jaimi correctly points out that this issue was not presented to the entire Supreme Court, but only to Justice Rehnquist. Jaimi argues that *McMillan v. Pennsylvania*, 477 U.S. 79,

106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) supports his position on this issue. It is interesting that Justice Rehnquist also wrote the opinion for the Court in *McMillan*, including the statement "that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." 477 U.S. at 88, 106 S.Ct. at 2420, 91 L.Ed.2d at 76. In his decision Justice Rehnquist cited *Proffitt* for the proposition: "Sentencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to the crime, ..." 477 U.S. at 88, 106 S.Ct. at 2420, 91 L.Ed.2d at 76. The crux of the decision in *McMillan* was the conclusion that the fact at issue there – visible possession of a firearm – was not an element of the crimes for which the defendants were convicted, but were instead "a sentencing factor that comes into play only after the defendant has been found guilty. . . ." *McMillan*, 477 U.S. at 84, 106 S.Ct. at 2416, 91 L.Ed.2d at 72. That is how we view the aggravating circumstances listed in I.C. § 19-2515(g).

To accept Jaimi's argument that the jury must be involved in determining whether aggravating circumstances exist, we would have to conclude that the aggravating circumstances listed in I.C. § 19-2515(g) are elements of first degree murder. We are unable to reach that conclusion. The circumstances listed in the statute are clearly circumstances to be considered in sentencing and not elements of first degree murder. It is not unconstitutional for a judge, instead of a jury, to determine whether any of the aggravating circumstances listed in the statute exist.

Our opinion in this aspect of the case is not changed by the decision of the Ninth Circuit in *Adamson v. Ricketts*,

865 F.2d 1011 (9th Cir. 1988). In *Adamson* the Ninth Circuit held Arizona's death penalty sentencing statutes to be in violation of the sixth amendment. During reargument of this case to determine what impact Adamson might have on our opinion here, the solicitor general for the state of Idaho acknowledged that there is no significant difference between the Arizona death penalty sentencing statutes and those of Idaho. Nevertheless, we are not convinced that *Adamson* correctly states the requirements of the sixth amendment on this issue.

Judicial sentencing in capital cases does not violate the sixth amendment. *Spaziano v. Florida,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). *Adamson* attempts to distinguish *Spaziano* on the ground that in *Spaziano* "the Court never reached the particular contention *Adamson* has raised: that Arizona's capital sentencing statute requires the judge to determine elements of the offense charged, thereby taking this factual element out of the jury's hands in violation of the Sixth Amendment." 865 F.2d at 1028. We disagree.

In *Spaziano* the Court noted that the Florida capital sentencing statute that was at issue directed the sentencing judge "to determine whether statutory aggravating circumstances were outweighed by statutory mitigating circumstances." 468 U.S. 450 n.4, 104 S.Ct. at 3157 n.4, 82 L.Ed.2d at 343 n.4. The Florida statute was similar in the important aspects to those portions of I.C. § 19-2515 relating to death penalty sentencing. The Florida statute provided that the sentencing judge should weigh the aggravating and mitigating circumstances. If the judge imposed a sentence of death, the judge was required to set forth in writing "findings upon which the sentence of

death is based as to the facts: (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and (6) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 1972 Fla. Laws, ch. 72-724, Sec. 921.141(3)(b). The aggravating circumstances enumerated in the Florida law at issue in Spaziano were similar in some respects to those contained in I.C. § 19-2515(g). Significantly, one of the aggravating circumstances in Florida was: "The capital felony was especially heinous, atrocious, or cruel." 1972 Fla. Laws, ch. 72-724, Sec. 921.141(6)(h). This is substantially the same as I.C. § 19-2515(g) (5) that is at issue here, except that our statute adds the qualifying phrase, "manifesting exceptional depravity."

The Florida Supreme Court noted in its decision "the trial judge found that the circumstances of the offense were especially heinous, atrocious, and cruel, and secondly, found that the defendant was previously convicted of felonies involving the use or threat of violence to the person." *Spaziano v. State*, 393 So.2d 1119 (Fla. 1981). On certiorari the United States Supreme Court held:

> The fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause, however, does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial. . . . The sentencer, whether judge or jury, has a constitutional obligation to evaluate the unique circumstances of the individual defendant and the sentencer's decision for life is final. *Arizona v. Rumsey*, [467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984)]. More important, despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding – a determination of the appropriate

> punishment to be imposed on an individual. [Citations omitted, except] *Williams v. New York*, 337 U.S. 241, 247-249, 69 S.Ct. 1079, 1083-1084, 93 L.Ed. 1337 (1949). The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.

468 U.S. at 454, 104 S.Ct. at 3161, 82 L.Ed.2d at 347.

These comments were made by the Court in considering death penalty sentencing by a judge under a statute substantially similar to our statute and with findings of aggravating circumstances similar to those here. This convinces us that the Court inherently considered and rejected the premise of the Ninth Circuit in Adamson: that a capital sentencing statute that requires the judge to determine aggravating circumstances takes this factual element out of the jury's hands in violation of the sixth amendment.

AS TO PART IX(A): SHEPARD, C.J., and BAKES, J., concur.

BISTLINE and HUNTLEY, JJ., dissent.

B. The letter from Marilyn's father.

1. Hearsay.

Jaimi asserts that it was a violation of the hearsay rule for the trial court to admit the letter written by Marilyn's father. We agree.

Prior to the sentencing hearings, the second defense attorney filed a motion "for a formal sentencing hearing in accordance with the provisions of Idaho Code §§ 19-2515, 19-2516, and that the defendant be afforded

all of the rights, both procedural and substantive, therein provided." I.C. § 19-2516 states:

> The circumstances [in aggravation or mitigation of punishment] must be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section. I.C. § 19-2515(d) provides for a presentence investigation in all death penalty cases and states that after the investigation the court shall "convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation."

This Court has approved the consideration by a sentencing judge in a death penalty case of the presentence investigation report provided for in I.C. § 19-2515(d), despite the requirement for live testimony in I.C. § 19-2516. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983). In reaching its decision in that case this Court stated: "We hold that the closing language of I.C. § 19-2516 clearly and unambiguously provides an exception to the otherwise required oral testimony and that those authorizations of I.C. § 19-2515 fall within the purview of the intended exception." 105 Idaho at 368, 670 P.2d at 469. We note that in Creech the defendant had "demanded that the entire sentencing record be produced by live witnesses testifying in open court, basing his

demand on I.C. § 19-2515 -2516 and the case law interpreting those statutes." 105 Idaho at 365, 670 P.2d at 466. *Cf. State v. Coutts*, 101 Idaho 110, 609 P.2d 642 (1980) and *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981) (no demand for a formal sentencing pursuant to I.C. § 19-2516).

The letter in question here was not part of a presentence report. Even if it had been, the hearsay could only have been included "where the presentence investigator believes that the information is reliable." I.C.R. 32(e)(l). Although the letter was offered and admitted at the time Mr. Arbaugh was testifying, permitting cross-examination of Mr. Arbaugh as to the statements made in the letter, this did not cure the hearsay nature of the statements. We construe I.C. § 19-2515(d) to permit the parties in a formal sentencing hearing to present all relevant evidence that would otherwise be admissible. Under *Creech* the contents of presentence investigation reports are an exception to this requirement. The state would have us also except from the requirement for live testimony under I.C. § 19-2516 "all relevant evidence" as referred to in I.C. § 19-2515(d). This interpretation would make relevant hearsay admissible in a sentencing hearing, even though it was not included in a presentence investigation report.

We note that the Idaho Rules of Evidence, except those with respect to privileges, do not apply to sentencing proceedings. I.R.E. 101(e)(3). Therefore, there is no conflict between I.C. § 19-2515(d) and these rules that would render the statute of no force or effect under I.R.E. 1102. However, if we were to allow all relevant hearsay to be admitted in formal death penalty sentencing hearings

we would destroy the requirement of I.C.R. 32(e) (1) that hearsay included in presentence reports be only that which the presentence investigator believes is reliable. The practice would quickly become for hearsay to be offered at the hearing rather than through the presentence report. Therefore, we hold that the letter should not have been admitted.

We are not dissuaded from our conclusion on this issue by the statement of the trial court in the written sentencing findings that he had "endeavored to avoid anything that might be hearsay, not absolutely pertinent or not totally supported by the evidence." (FINDINGS OF THE COURT IN CONSIDERING DEATH PENALTY UNDER I.C. 19-2515, p. 13) In a matter as awesome as the decision whether to impose the death penalty, a strict compliance with the procedures for sentencing is required. Even a well intentioned and conscientious effort by the trial court to avoid considering the hearsay contained in the letter does not suffice.

AS TO PART IX B(1): HUNTLEY, J., concurs.

BAKES, and BISTLINE, JJ., concur in the result.

SHEPARD, C.J., dissents.

2. Victim impact statement.

Jaimi also asserts that Mr. Arbaugh's letter should not have been admitted because it was a victim impact statement (VIS), prohibited in death penalty cases by *Booth v. Maryland*, 428 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). We agree. We also take this opportunity to advise the trial court on resentencing to apply *Booth* to the VIS contained in the presentence report.

In *Booth* the Court held that the introduction of a VIS at the sentencing phase of a capital murder case violates the eighth amendment to the United States Constitution. The Court held invalid a Maryland statute that requires consideration of a VIS describing the effect of the crime on the victim and the victim's family. Here, the State filed a motion for the trial court to receive Mr. Arbaugh's letter into evidence pursuant to I.C. § 19-5306(1)(b) and (3). That statute provides:

> (1) Upon request, each victim of a felony offense shall be:
>
> . . . .
>
> (b) Consulted by the presentence investigator during preparation of the presentence report and have included in that report a statement of the impact which the defendant's criminal conduct has had upon the victim;
>
> . . . .
>
> (3) The provisions of this section shall apply equally to the immediate families of homicide victims or immediate families of victims of such youthful age or incapacity as precludes them from exercising these rights personally.

This statute is similar to the Maryland statute considered by the Court in *Booth*.

The presentence report contains an indication that the investigator received both written and oral comments from Marilyn's parents. These comments were included in the report as a VIS. This VIS refers to the relationship between Marilyn and Jaimi, assaults on Marilyn by Jaimi on several occasions, pleas by Marilyn to Jaimi that he stay away from Marilyn and her children, statements by Marilyn to her father about threats made toward Tiffnie

and Mr. Arbaugh by Jaimi, and a handwritten will by Marilyn naming her daughters as beneficiaries as a result of her expectation of the outcome of the threats by Jaimi. The report also indicates that Marilyn's mother told the presentence investigator that Tira seemed to have withdrawn into herself after Marilyn's death. Marilyn's parents are reported by the presentence investigator to have a deep fear of Jaimi and to have expressed the hope that the trial court would take measures to insure the safety of themselves and Marilyn's two daughters.

Mr. Arbaugh's letter to the trial judge was written almost five months after the presentence report was submitted. Much of the information contained in the letter had already been included in the VIS portion of the presentence report. We note that the second defense attorney moved to strike the VIS portion of the presentence report.

In *Booth* the Court found that two types of information were included in the VIS: "First, it described the personal characteristics of the victims and the emotional impact of the crimes on the family. Second, it set forth the family members, opinions and characterizations of the crimes and the defendant." 482 U.S. at 500, 107 S.Ct. at 2533, 96 L.Ed.2d at 444. The Court found that "this information is irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." 482 U.S. at 500, 107 S.Ct. at 2533, 96 L.Ed.2d at 444. The letter did not contain the first type of information described in *Booth*, but did contain the second type. The VIS portion of the presentence report contained both types of information.

While sentencing in death penalty cases in Idaho is by a judge and not by a jury, as is the case in Maryland, we do not consider this to be a distinction that makes Booth inapplicable to a VIS in a death penalty case in Idaho. Although we have upheld sentencing by district judges in death penalty cases, we are not prepared to interpret the eighth amendment to give judges more latitude than juries in making their decisions as to whether a defendant should be executed. The risk of arbitrary and capricious decisions exists whether the sentence is determined by a jury or a judge. Therefore, we hold that the letter should not have been considered by the trial court in the sentencing. We advise the trial court that when resentencing Jaimi, as provided below, Booth should also be applied to the VIS contained in the presentence report. We also declare that I.C. § 19-5306(1)(b) and (3) are unconstitutional under the eighth amendment insofar as they allow the two types of information proscribed in Booth to be considered in a death penalty case.

AS TO PART IX B(2): BAKES, BISTLINE and HUNTLEY, JJ., concur.

SHEPARD, C.J., dissents.

C. Findings.

1. Did the trial court improperly consider aggravating circumstances not listed in I.C. § 19-2515?

Jaimi asserts the in its FINDINGS OF THE COURT IN CONSIDERING DEATH PENALTY UNDER I.C. 19-2515 (the Findings) the trial court improperly considered circumstances not listed in the statute. Secondarily, he asserts that he was gravely prejudiced because when the

trial court considered these circumstances, he was denied notice that the trial court would predicate its sentence on these circumstances. We disagree with both of these assertions.

As an example of the findings that he argues were objectionable, Jaimi cites the portion of the Findings which states that at the time Tiffnie left the barn after finding her mother bleeding and wounded with Jaimi standing over her, "the life of Marilyn Arbaugh probably could have been saved if she had received the necessary medical attention." He argues that if he had been notified that the trial court intended to consider this circumstance, he would have contested the issue vigorously. He also contends that the consideration of these "non-statutory aggravating circumstances" violated the cruel and unusual punishment clause of the eighth amendment and permits circumstances not found beyond a reasonable doubt to enter the sentencing decision.

This Court has previously rejected all these arguments except the one based on the eighth amendment. *Creech*, 105 Idaho at 369-70, 670 P.2d at 470-71; Sivak, 105 Idaho at 905, 674 P.2d at 401. With regard to the eighth amendment claim, we note that the trial court concluded the Findings by stating:

> This Court finds beyond a reasonable doubt that the facts establish the statutory aggravating circumstances set forth in Idaho Code Section 19-2515 (G)(5) and 19-2515 (G)(6). This murder was especially heinous, atrocious and cruel thereby manifesting exceptional depravity. Further by this murder and the circumstances surrounding its commission, Jaimi Dean Charboneau exhibited utter disregard for human life.

Through this portion of the Findings the trial court made clear that its decision was not based on non-statutory aggravating circumstances. Therefore, we need not address the eighth amendment argument.

AS TO PART IX C(1): SHEPARD, C.J., BAKES, and HUNTLEY, JJ., concur.

BISTLINE, J., dissents.

2. Findings not supported by evidence.

Jaimi asserts that there was not sufficient evidence to support a critical portion of the Findings. He challenges the following statement of the trial court:

> That after firing the first volly (sic) of shots the victim Marilyn Arbaugh was wounded but her life could have been saved if she had received necessary medical attention. At that moment the defendant, Jaimi Charboneau had a choice. He could have saved the woman he professed to love. However, with at least two minutes to give thought to the matter, the defendant, Jaimi Dean Charboneau, chose to fire additional shots into the wounded and helpless body of Marilyn Arbaugh. It appears from the facts that Jaimi Dean Charboneau acted intentionally, methodically and violently while he erased from the face of this earth the life of a human being.

Jaimi relies on the testimony of the State's pathologist to rebut the trial court's statement that Marilyn could have been saved, if she had received necessary medical attention before the final shots were fired. The pathologist testified that the cause of death was gunshot wounds of the chest that severed arteries to the heart and lungs. He stated that he had no opinion as to which of the bullets caused the fatal wounds and that it was beyond the expertise of a pathologist to give an opinion as to the

order in which the wounds occurred. There is no other evidence in the record that contradicts this testimony. Therefore, we agree that there is no evidence in the record that supports the trial court's statement.

It is unclear from the Findings whether the trial court would have imposed the death penalty without having concluded that Marilyn was not mortally wounded until the second volley of shots was fired. For that reason, together with others expressed above and below, we vacate the sentence and remand for resentencing.

AS TO PART IX C(2): BISTLINE and HUNTLEY, JJ., concur.

SHEPARD, C.J. and BAKES, J., dissent.

3. Mitigating factors.

Jaimi asserts that the trial court failed to list in the Findings all the mitigating factors that were presented. He argues particularly that the trial court failed to consider significant family information contained in the presentence report. We have compared the trial court's statement of mitigating factors with the presentence report and are unable to agree with Jaimi on this issue. All of the material mitigating information contained in the report is reflected in the Findings.

AS TO PART IX C(3): SHEPARD, C.J., BAKES, BISTLINE and HUNTLEY, JJ., concur.

4. Vagueness of I.C. § 19-2515(g)(5) and (6).

Jaimi asserts that I.C. § 19-2515(g)(5) and (6) are unconstitutionally vague and that their use in determining Jaimi's sentence violates the eighth amendment. He

argues that *Maynard v. Cartwright*, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) and *Adamson v. Ricketts*, 865 F.2d 1011 (1989) support his position with regard to I.C. § 19-2515(g)(5). He argues that the meaning given to I.C. § 19-2515(g)(6) in *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981) was inadequate. We disagree.

In *Maynard* the Supreme Court held that the "especially heinous, atrocious, or cruel" aggravating circumstance of the Oklahoma death penalty statute was unconstitutionally vague under the eighth amendment because it did not offer sufficient guidance to the jury in deciding whether to impose the death penalty. The decision of the Tenth Circuit Court of Appeals that was affirmed in *Maynard* (*Cartwright v. Maynard*, 822 F.2d 1477 (10th Cir. 1987)) noted that the Oklahoma courts had not "adopted a limiting construction that cured the [vagueness] infirmity." 486 U.S. at ___, 108 S.Ct. at 1857, 100 L.Ed.2d at 376. In its opinion the Supreme Court also distinguished the situation in *Maynard* from that in *Proffitt v. Florida*, 428 U.S. 242, 254-56, 96 S.Ct. 2960, 2972-73, 49 L.Ed.2d 913, 925-26 (1976).

In *Osborn* this Court adopted the definition of "heinous, atrocious and cruel" of the Florida Supreme Court that was approved in *Proffitt*. This court quoted the following interpretation of the Florida court:

> "It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. *What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set*

> *the crime apart from the norm of capital felonies – the conscienceless or pitiless crime which is unnecessarily torturous to the victim.*" [Citation omitted.] (Emphasis added.)

102 Idaho at 418, 631 P.2d at 200.

This Court also adopted the definition of "exceptional depravity" of the Nebraska Supreme Court in *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881, 891 (1977) *cert. den.*, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed.2d 158, *reh. den.*, 434 U.S. 961, 98 S.Ct. 496, 54 L.Ed.2d 322 (1977). This Court quoted the following definition of the Nebraska court:

> "In interpreting this portion of the statute, the key word is 'exceptional.' It might be argued that every murder involves depravity. The use of the word 'exceptional,' however, confines it only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence."

102 Idaho at 418, 631 P.2d at 200.

We find that these definitions remove the vagueness from I.C. § 19-2515(g)(5) that would cause us to hold the use of it to be in violation of the eighth amendment according to *Maynard*.

In *Osborn* this Court also construed the "utter disregard for human life" provision of I.C. § 19-2515(g)(6):

> [W]e hold that the phrase "utter disregard" must be viewed in reference to acts other than those set forth in I.C. §§ 19-2515(f)(2), (3), and (4) [now §§ 19-2515(g)(2), (3), and (4)]. We conclude instead that the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human

> life, i. e., the cold-blooded, pitiless slayer. With such an interpretation, it is our conclusion that this aggravating circumstance meets the constitutional requirements set forth by the United States Supreme Court.

102 Idaho at 419, 631 P.2d at 201.

We agree.

Our opinion as to this issue is not changed by *Adamson v. Ricketts*. In *Adamson* the Ninth Circuit held that the interpretation by the Arizona Supreme Court of the portion of Arizona's death penalty sentencing statute that is similar to I.C. § 19-2515(g)(5) was not sufficient "to provide satisfaction of *Godfrey's [Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)] mandate that aggravating circumstances objectively guide discretion and narrow application of the death penalty." 865 F.2d at 1033. We note that *Godfrey* cited *Proffitt v. Florida* without distinguishing its rationale or its result. 446 U.S. at 425, 100 S.Ct. at 1764, 64 L.Ed.2d at 403. As we have indicated above, the definition of "heinous, atrocious and cruel" adopted by this Court in *Osborn* was that of the Florida Supreme Court that was approved in *Proffitt*. Therefore, we are convinced that whatever validity there may be to the decision in *Adamson* concerning the Arizona definitions of their statutory terms, the definitions contained in *Osborn* remain constitutionally sufficient.

AS TO PART IX C(4): SHEPARD, C.J., BAKES and HUNTLEY, JJ., concur.

BISTLINE, J., dissents.

5. No duplication of aggravating circumstances.

The trial court found that the aggravating circumstances referred to in both I.C. § 19-2515(g)(5) and (6)

were present in this case. Jaimi asserts that it was improper for the trial court to use both of these aggravating circumstances in determining his sentence, because they duplicate each other. Today, this Court has held that these two factors are not duplicative. *State v. Fain*, 1989 Slip Op. No. ___. Therefore, we reject Jaimi's assertion.

AS TO PART IX C(5): SHEPARD, C.J., BAKES and HUNTLEY, JJ., concur.

BISTLINE, J., dissents.

6. Weighing mitigating circumstances against I.C. § 19-2515(g)(5) and (6) separately.

I.C. § 19-2515(c) states:

> (c) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

Jaimi asserts that this statute requires the trial court to weigh all the mitigating circumstances presented against each aggravating circumstance found, separately. He argues that if the trial court finds that all the mitigating circumstances presented outweigh any one of the aggravating circumstances found, then the sentence of death may not be imposed. He contends that this required weighing was done incorrectly by the trial court in this case. We agree that all the mitigating circumstances presented must be weighed against each of the

aggravating circumstances separately. We hold that the trial court may not sentence the defendant to death, unless the trial court finds that all the mitigating circumstances outweigh the gravity of each of the aggravating circumstances found and make imposition of death unjust.

Criminal statutes must be strictly construed. *State v. Thompson*, 101 Idaho 430, 437, 614 P.2d 970, 977 (1980). I.C. § 19-2515(c) refers to "mitigating circumstances" that are to be weighed against "any aggravating circumstance found." If the legislature had intended the mitigating circumstances to be weighed against all the aggravating circumstances found as a group, it would have referred to "the aggravating circumstances found." The plain meaning of the statute dictates our conclusion on this issue.

We are unable to accept Jaimi's argument that the statute requires the trial court not to impose the death penalty, if the mitigating circumstances outweigh any one of the aggravating circumstances found. The plain meaning of the statute is that the mitigating circumstances must outweigh "any" of the aggravating circumstances. The word "any" means "whichever one chance may select." *Webster's Third New International Dictionary*, (1969). For the mitigating circumstance in this case to outweigh "any" aggravating circumstances found, the mitigating circumstances must outweigh each of the aggravating circumstances, since chance may select either one.

In its findings the trial court quoted I.C. § 19-2515 as stating:

> Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any *aggravating circumstances* found and make imposition of death unjust. (Emphasis added).

In making its decision as to the appropriate sentence to impose, the trial court said:

> After due consideration to all the facts contained herein, the Court is unable to find any mitigating circumstances which would overcome or outweigh the *aggravating circumstances* and must therefore comply with the legislature's mandate. (Emphasis added).

It appears to us that the trial court weighed all the mitigating circumstances against the two aggravating circumstances found, collectively rather than separately. For this reason also, we vacate the sentence and remand for resentencing in accordance with our decision.

AS TO PART IX C(6): SHEPARD, C.J., BAKES, BISTLINE and HUNTLEY, JJ., concur.

7. Presumption of death.

Jaimi asserts that I.C. § 19-2515 violates the eighth and fourteenth amendments because it places the burden on a defendant to prove the existence of mitigating circumstances that outweigh any aggravating circumstance that is found. We disagree.

I.C. § 19-2515(c) presumes that a life sentence is the sentence for first degree murder. Only if at least one of the aggravating circumstances listed in I.C. § 19-2515(g) is found to exist beyond a reasonable doubt may a sentence of death be imposed. It is only then that a defendant has

the burden of coming forward with mitigating circumstances. To the extent that Adamson reaches a contrary result, we disagree with the Ninth Circuit.

AS TO PART IX C(7): SHEPARD, C.J., BAKES, BISTLINE and HUNTLEY, JJ., concur.

X.

AUTOMATIC REVIEW UNDER I.C. § 19-2827.

A. Was the sentence imposed under the influence of passion, prejudice, or any other arbitrary factor?

Jaimi asserts that the sentence of death in this case was arbitrary because there was no evidence to support portions of the Findings that we have reviewed above. To the extent of our holdings above that there was not sufficient evidence to support portions of the Findings, we agree. We disagree that there was arbitrariness because mitigating factors concerning Jaimi's family background were not considered. We also disagree that there was arbitrariness because this was an act of passion rather than a case involving malice aforethought. That question was submitted to the jury, and the jury found otherwise.

B. Did the evidence support the findings of a statutory aggravating circumstance under I.C. § 19-2515?

We have held above that there was no evidence in the record to support the trial court's statement that Jaimi could have saved Marilyn's life, if he had sought medical attention for her. We have also held that it was a violation of *Booth v. Maryland* and the hearsay rule for the trial

court to admit and consider the letter written by Marilyn's father. Therefore, it is unnecessary for us to consider at this time whether the evidence supports a finding of either statutory aggravating circumstance under I.C. § 19-2515(g) (5) and (6). This review can be made following resentencing, if it is necessary.

C. Was the sentence excessive or disproportionate to the penalty imposed in similar cases?

In light of our decision to vacate the sentence, this review is also unnecessary.

AS TO PART X: HUNTLEY, J., concurs.

SHEPARD, C.J., concurs in result.

BAKES, J., concurs in all of Part X, except that part which incorporates the analysis of Part IX(C)(2), with which he disagrees.

BISTLINE, J., expresses no opinion.

XI.

CONCLUSION.

For the reasons stated above, we affirm the conviction, vacate the sentence, and remand for resentencing.

SHEPARD, C.J. concurring in part and dissenting in part.

I concur in the majority opinion except parts IX B and IX C(2), and as to those portions I disagree and therefore dissent.

The majority holds that during the sentencing procedure a letter written by the father of the victim was

improperly "admitted" in violation of the hearsay rule. This although the report of the presentence investigator, is also hearsay and in fact hearsay upon hearsay. I believe the focus of the majority opinion, the hearsay rule, is inapplicable. In my view the letter, while "hearsay," was at worst only duplicative of the oral testimony of that same witness at the sentencing hearing. That oral testimony taken in open court was subject to cross-examination. Hence the admission of the letter written by the father of the victim was at most harmless error.

The testimony of that witness, both oral and written, in essence related the well justified fear of the remaining members of the family of defendant Charboneau. In my view such evidence was particularly relevant since, as indicated by the majority opinion, the defendant Charboneau had accused his stepdaughter of the killing.

I also disagree with the majority holding that *Booth v. Maryland*, ___U.S.___ (1987), requires the exclusion of the Arbaugh letter, and portions of the presentence report as being a "victim impact statement." *Booth* was a jury setting death penalty case rather than a court setting death penalty case. That alone, in my view, makes *Booth* distinguishable from the instant case. Further, *Booth* was a 5-4 decision by the then membership of the then Court. In view of the vigorous dissents to *Booth* and the now changed membership of that Court, I am not persuaded that the now constituted United States Supreme Court would continue the view espoused in *Booth*.

I.C. § 19-5306 requires a sentencing court to consider the impact of the crime upon the immediate families of homicide victims. I perceive no constitutional invalidity

of that statutory scheme since here we consider only Idaho's mandated court setting of the death penalty.

I disagree with the conclusion of the majority in IX C(2). In my view the majority opinion, in its recitation of the facts, supports the language of the trial court in its sentencing. The testimony of Tiffnie supports the statement of the trial court.

I would affirm the conviction and the imposition of the death penalty.

HUNTLEY, J., concurring and dissenting.

While I support the death penalty and concur in the bulk of the majority opinion, I respectfully suggest that Idaho's present capital sentencing procedure is unconstitutional because it removes the jury from its constitutional fact-finding role. Our process violates the federal constitution for the reasons stated in *Adamson v. Ricketts*, (Ct. App. 9th Cir., December 22, 1988) and violates the Idaho Constitution for the reasons I have articulated in *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983) and *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983). I will discuss each analysis in turn.

I.

The Jury as Fundamental to Preserving Democracy

The determination of the issue presented on appeal should be made in the context of the history and purposes of the right to trial by jury. Our forefathers wisely provided in Article 1, Section 7 of the Idaho Constitution: "The right to trial by jury shall remain inviolate . . . " They so provided because they recognized that the jury

system is the single most important guardian of the people's right to be protected from oppressive and overreaching government.

Few Americans realize that the right to jury trial in civil cases has almost been lost in England. English judges, with the acquiescence of a compliant bar, have totally eliminated the right to trial by jury in civil cases, except in cases of libel or slander. The English themselves seem to have forgotten the words of their eminent jurist, Blackstone, who wrote that trial by jury is:

> . . . the glory of the English law . . . [i]t is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected in his property, his liberty, or his person but by the unanimous consent of twelve of his neighbors and equals.

Blackstone Commentaries 79.

Some American judges and legislators have similarly lost touch with the following language in our Declaration of Independence:

> [George III] has combined with others to subject us to a jurisdiction foreign to our Constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation: . . . For depriving us, in many cases, of the benefits of trial by jury . . .

The French philosopher and essayist, de Tocqueville, who understood and appreciated democracy in America with keener insight than any other observer of the Nineteenth Century, stated that the jury system in America:

> . . . places the real direction of society in the hands of the governed . . . and not in . . . the government . . . He who punishes the criminal . . . is the real master of society. All the sovereigns who have chosen

> to govern by their own authority and to direct society, instead of obeying its direction, have destroyed or enfeebled the institution of the jury.

Those who believe in strict construction of our Constitution recognize that the judiciary's oath to "support and defend the Constitution" requires that we resist the temptation to enhance judicial power through encroachment into the provinces constitutionally delegated to the jury.

II.

The Federal Right to Jury Fact Finding in Capital Cases

In *Adamson v. Ricketts*, the 9th Circuit stated the issue:

> Adamson also contends that the Arizona statutory scheme for imposing the death penalty erroneously lists elements of the offense as factors to be determined by the sentencing judge, thus depriving him of his right to a jury decision on the elements of the crime in violation of the Sixth and Fourteenth Amendments. We agree.

The Idaho sentencing procedure under I.C. § 19-2515 is virtually identical in all material respects to the defective Arizona statutory scheme. Noteworthy is the fact that Idaho and Arizona are two of only four states which have the death penalty which have taken the jury out of the fact-finding process of making the ultimate determination as to whether the death penalty is appropriate. The fact that thirty-one of the thirty-five states which have the death penalty utilize the jury in making that determination speaks volumes as to what our Anglo-American traditions and constitutions require.

As the *Adamson* court noted:

> An aggravating "circumstance" which elevates a murder to a "death-eligible" murder in the penalty phase, remarkably mirrors the attributes of an essential element of the offense during the guilt phase of a trial. Like an element of a crime, an aggravating circumstance in the Arizona scheme informs the prosecutor what facts must be proven to obtain a conviction. The circumstance must be proven beyond a reasonable doubt. The hearing is adversarial, with oral argument and the prosecution's presentation of evidence governed by the usual rules of evidence. The presiding trial judge must make findings on the existence or nonexistence of each of the statutory aggravating and mitigating circumstances. If the judge finds an aggravating circumstance, the burden then shifts to the defendant who must put on sufficient evidence of mitigation or the death penalty will be imposed. A.R.S. §§ 13-703; see also Arizona v. Rumsey, 467 U.S. 203, 21 (1984). If the prosecution is unable to prove the existence of a single aggravating circumstance, like not proving an essential element, the defendant cannot be put to death. Cf. Poland v. Arizona, 106 S.Ct. 1749, 17454 (1986) (Court framed the relevant [*39] inquiry as "whether the sentencing judge or the reviewing court has "decid[ed] that the prosecution has not proved its case for the death penalty and hence has 'acquitted' petitioners"); Rumsey, 467 U.S. at 212 (where findings of fact at sentencing hearing were all favorable to defendant, he was "acquitted" of the death penalty).

Although Idaho's majority in *Charboneau*, similarly to the judiciary in Arizona and the prosecutors in both states, urge that a trial court in finding facts as to aggravating circumstances is exercising a "sentencing determination" as distinguished from finding the elements of a death-eligible murder, their use of the language in justifying that position frequently results in Freudian slips

which indicate otherwise. In fact, to rule for the state's position it is necessary to do exactly what the majority did in this case, that is, engage in a circular argument, the majority reasoning at pages 28-29:

> To accept Jaimi's argument that the jury must be involved in determining whether aggravating circumstances exist, we would have to conclude that the aggravating circumstances listed in I.C. § 19-2515(g) are elements of first degree murder. We are unable to reach that conclusion. *The circumstances listed in the statute are clearly circumstances to be considered in sentencing and not elements of first degree murder.* It is not unconstitutional for a judge, instead of a jury, to determine whether any of the aggravating circumstances listed in the statute exist.

The sentence I have underscored is totally circular. Of course, if one can pronounce that the circumstances are part of sentencing and not part of the elements of a death penalty crime, then they are not elements of a death penalty crime.

The plain fact is, before a person is eligible to be executed, a *finding* must be made that the aggravating circumstances existed. That finding is typically a jury finding, it was a jury function in Idaho from territorial days through 1977, and is a fact to be found by the jury in all but four of the states which have the death penalty.

It could of course be argued that my position is circular if I were to take the underscored sentence from the majority opinion, *supra*, and restate it as follows:

> The circumstances listed in the statute are not circumstances to be considered in sentencing but are elements of death-eligible murder.

However, I would submit that the issue is best resolved by recognizing that it is traditional and accepted jurisprudence that every factor required to prove a crime is considered an element of that crime. One cannot be sentenced to death without the finding of the aggravating circumstances having taken place and, thus, they would appear to be essential elements of the crime rather than some less important procedural matters occurring during sentencing.

The United States Supreme Court has not passed directly upon the issue presented in this case, but what it has written about the jury and its function in death penalty cases indicates that the process would be best served by bringing the four states in line at this time.

Since the Court has held that death sentences must comport with the community's sense of evolving standards of decency and its legitimate desire for moral retribution, an essential question is whether judges alone can reliably reflect the communal values that are the source of the constitutionality of capital punishment.

By definition, juries, not judges, are "the cross-section of the community," reflecting community values. *Duren v. Missouri*, 439 U.S. 357, 359 99 S.Ct. 664, 666, 58 L.Ed.2d 579 (1979). Only a representative jury assures "meaningful community participation." *Ballew v. Georgia*, 435 U.S. 223, 235 98 S.Ct. 1029, 1036, 55 L.Ed.2d 234 (1978) (plurality opinion). Jurors, unlike judges, are selected to enhance the likelihood that they represent the whole range of community beliefs and background, *Taylor v. Louisiana*, 419 U.S. 522, 531-33 95 S.Ct. 692, 698-699, 42

L.Ed.2d 690 (1975); the different segments of the community bring to the representative jury "perspectives and values that influence both jury deliberation and result," *id.* at 532 n. 12 95 S.Ct. at 698 n. 12. See *Humphrey v. Cady*, 405 U.S. 504, 509 92 s.Ct. 1048, 1052, 31 L.Ed.2d 394 (1972). Moreover the sheer difference in size between a twelve-member jury panel and a single judge may bear significantly on the validity of a sentencing decision under the Eighth Amendment. Canvassing expert empirical studies, the United States Supreme Court has concluded that the likelihood that a decision in a criminal case correctly applies "the common sense of the community to the facts" increases with the number of decisionmakers. *Ballew v. Georgia, supra*, 435 U.S. at 232 98 S.Ct. at 1035.[1] Twelve individuals are obviously more likely to reflect the prevailing views of society than one person.[2]

A jury need not engage in questionable speculation to determine what community sentiment would say in a particular case. Its very function is to bespeak that community sentiment by exercising its own judgment. The jury's response is society's response. *Witherspoon v. Illinois, supra*, 391 U.S. at 519-20 88 S.Ct.at 1775-1776. "The jury . . . is a significant and reliable objective index of

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[1] *Ballew* also amassed considerable empirical evidence to prove that reducing the number of decisionmakers in a criminal case impairs the accuracy, fairness, thoroughness and consistency of the decision, generally to the detriment of the defendant. *Ballew v. Georgia*, 435 U.S. 223, 232-39 [98 S.Ct. 1029, 1035-38, 55 L.Ed.2d 234] (1978) (plurality opinion).

[2] Significantly, every state authorizing jury involvement in capital sentencing appears to require a jury of twelve persons. *S. Gillers, Deciding Who Dies*, 129 U.Pa.L.Rev. 63, n. 298.

contemporary values because it is so directly involved," *Gregg v. Georgia, supra,* 428 U.S. at 181 96 s.Ct. at 2928. By contrast, judges cannot themselves speak for community sentiment. If they are to fulfill the demands of the Eighth Amendment by bringing evolving standards of decency and principles of retribution to bear in a capital punishment case, they can do so only indirectly since "[C]ourts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits." *Dennis v. United States,* 341 U.S. 494, 525 71 S.Ct. 857, 875, 95 L.Ed. 1137 (1951) (Frankfurter, J., concurring). Unable to represent community sentiment, a judge must undertake to ascertain it. That is necessarily a difficult task,[3] made even more difficult because judges – whether considered in terms of race, sex, or economic class – do not reflect the wide range of backgrounds or

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[3] Judges may theoretically have access to community sentiment through social contact, as well as through such sources as polls, editorials, journals, and newspaper reports. Cook, *Public Opinion and Federal Judicial Policy,* 21 Am.J.Pol.Sci. 567, 576 (1977). Unfortunately, these sources greatly overstate the willingness of members of the community to impose the death penalty on specific defendants for specific crimes. Research on jury behavior reveals that jurors are substantially more lenient when trying an actual case and sitting through deliberations than they will otherwise indicate. Aeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court,* 30 Stan.L.Rev. 491, 511-12 (1978) (shadow juries drawn randomly and not subject to peremptory challenges vote guilty far more often than real juries; probably because the defendant's liberty was not in their hands). People who favor the death penalty in the abstract are more lenient when presented with descriptions of actual cases.

beliefs within the community.[4] "[T]he reluctance of juries in many cases to impose the sentence [of death] may well reflect the humane feeling that this most irrevocable sanction should be reserved for a small number of extreme cases," *Gregg v. Georgia, supra,* 428 U.S. at 182 96 S.Ct. at 2929. For a variety of reasons, judges appear less likely to reflect that same reluctance.[5]

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[4] As of 1979 judges in state courts of general trial jurisdiction earned salaries ranging from $24,000 in Oklahoma to $54,205 in California, with a mean of approximately $41,000. Nat'l Center for St. Cts., Survey of Judicial Salaries 1 (Sept. 1979). As of 1977 in these general jurisdiction courts, only 2.5 percent of the 5,155 judges were women, and 20 states had no women at all on these courts. Cook, Women Judges: *The End of Tokenism, in Women in the Courts,* 84, 87-88 (Nat'l Center for St. Cts. 1978). It appears that as of 1977 only 2.6 percent of the judges on these general trial courts were black. G.W. Crockett, Number and Distribution of Black Judges (March 1977) (unpublished charts on file with Nat'l Center for St. Cts.). Finally, the rigorous educational requirements for admission to the bar make it inevitable that the average educational attainment of judges will far exceed that of the community in general.

[5] Kalven and Zeisel's classic report shows that judges and juries disagree in a substantial number of cases. In a study of 3576 trials, judge and jury reached the same decision about a criminal defendant only 72 percent of the time. *H. Kalven & H. Zeisel, The American Jury,* 68 (1966). In their specific study of the death penalty, the authors report that judge and jury disagreed about the imposition of a death sentence in 19 percent of the cases, *id,* at 436. To view the results yet another way, in those cases where one or both recommended death, judge and jury disagreed 60 percent of the time. In those cases in which either the judge or jury or both would have voted for the death penalty, in 40 percent, judge and jury agreed, and in 40 percent

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only the judge would have voted for the death penalty, yet in only 20 percent of the cases would the jury but not the judge vote for execution. Thus, the juries were essentially twice as lenient as the judges. *Ibid.* As a United Nations Report concludes:

> "[A]mong the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favour the retention of capital punishment. The specialists of the social sciences, penologists, doctors and writers on social science or criminology are, in their great majority, abolitionists. The supporters of capital punishment, apart from a number of political figures and persons holding high public office, are generally jurists with a traditional training and judges."

United Nations, Dept. of Economic and Social Affairs, Capital Punishment (ST/SOA/SD/9-10-64) (1968).

The reason for these differences may lie in the greater reluctance of judges to depart from what they perceive to be the letter of the law. See, *e.g., Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869 71 L.Ed.2d 1 (1982). Kalven and Zeisel discovered in more than one judge "a kind of envy of the freedom of the jury to reach a decision which he as a judge could not reach" *Kalven & Zeisel, supra,* at 428. The judge's role as a strict enforcer even restricts his discretion in sentencing decisions where that discretion would seem to be wholly lawful. As one judge said of draft evasion cases: "I am opposed to conscription. I also believe that the war in Vietnam is both immoral and impractical. My sentencing policies are based upon the fact that as long as law exists, it should be imposed to effectuate its intent and purpose." Cook, *Sentencing Behavior of Federal Judges:* Draft Cases – 1972, 42 Cinn.L.Rev. 597, 623 (1973). At the same time, Cook's study also reveals that as judges (unlike individual jurors) accrue experience in a given type of case, their sentencing settles into distinct and regular patterns of severity or leniency, *id.*, at 602-03, so that the judge's first

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As a means of reliably reflecting community sentiment on capital punishment, bringing lay jurors into the sentencing process " 'places the real direction of society in the hands of the governed . . . and not in . . . the government.' " Powell, *Jury Trial of Crimes*, 23 Wash. & Lee L.Rev. 1, 5 (1966) quoting de Tocqueville, Democracy in America 282 (Reeve Tran.1948). Quintessentially, the right to a jury "is granted to criminal defendants in order to prevent oppression by the government," *Duncan v. Louisiana*, 391 U.S. 145, 155 88 S.Ct. 1444, 1450, 20 L.Ed.2d 491 (1968), and to protect against "arbitrary action" by the compliant, biased, or eccentric judge. *Id.* at 156 88 S.Ct. at 1451. It "reflects a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizens to one judge or to a group of judges." *Ibid.*[6] These concerns are

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decision whether a person lives or dies may inspire far more deliberation and consideration than subsequent decisions. For individual jurors, however, the gravity with which they approach their decisions in capital cases will rarely be affected by such routinization.

Florida studies cited in *Gillers, supra*, note 2, at 67-68 n. 318, report that sentencing judges were significantly more inclined to impose death than the juries that recommended sentences to them. The studies also show that the judges' decisions seem to correlate with the race, sex, and social background of the defendant and victim, while the juries showed no evidence of any such biases.

[6] The *Profitt* plurality's speculation that "judicial sentencing should lead, if anything, to even greater consistency in the

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even more compelling where life stands immediately in the balance.

III.

The Idaho Constitutional Mandate

The Idaho Constitution, as first approved on July 3, 1890, and as it reads today, provides in Art. 1, § 7:

"Right to trial by jury. – The right of trial by jury shall remain inviolate . . . ." That right of trial by jury as it

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imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury and therefore is better able to impose sentences similar to those imposed in analogous cases," *Proffitt v. Florida*, 428 U.S. 242, 252 96 S.Ct. 2960, 2966, must, of course, be read in the context in which it was made: as a statement of the probable result of the Florida system in which an advisory jury sentence may be mitigated at the discretion of the trial judge, or increased from life imprisonment to death only where a life sentence would be manifestly unreasonable. *Id.* at 249-50 96 S.Ct. at 2965-2966. Moreover, empirical evidence suggests that individual state trial judges are not likely to achieve consistency among death sentences meted out across the state. *Gillers, supra*, note 2, at 58-59. *Cook, Public Opinion and Federal Judicial Policy*, 21 Am.J.Poli.Sci. 567, 623 (1977). Rather the state can better take advantage of the purported ability of judges to ensure consistency in capital sentencing, at no cost to the defendant's right to jury sentencing, by relying on the automatic appeal procedure by which this Court must review each death sentence in comparison to other cases involving similar crimes or defendants. I.C. § 19-2827. See, *Gregg v. Georgia*, 428 U.S., at 204-06 96 S.Ct. at 2939-2940; *id*, at 211-12, 96 S.Ct. at 2942-2943 (White, J., concurring).

existed at the time our constitution was adopted, provided for jury participation in the capital sentencing process. Section 17 of the Criminal Practice Act of 1864 provided in pertinent part:

> [A]nd the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict, whether it be murder of the first or second degree; but, if such person shall be convicted on confession in open court, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly. Every person convicted of murder of the first degree, shall suffer death, and every person guilty of murder in the second degree is punishable by imprisonment in the territorial prison for a term not less than ten years, and which may be extended to life.

Section 17 was carried over verbatim into Revised Statute § 6563 (1887) enacted two years before the adoption of the Constitution.

In other words, the jury, by determining whether the party was guilty of either first or second degree murder, determined whether or not the death penalty would be imposed.

In *Blue Note Inc. v. Hopper*, 85 Idaho 152, 157, 377 P.2d 373 (1962), we stated:

> The provisions of the constitution pertaining to the right to trial by jury are construed to apply as it existed at the date of the adoption of the constitution.

Accord. Anderson v. Whipple, 71 Idaho 112, 227 P.2d 351 (1951); *Christensen v. Hollingsworth*, 6 Idaho 87, 53 P. 211 (1898); *Comish v. Smith*, 97 Idaho 89, 540 P.2d 274 (1975).

Idaho continued to employ the jury in the capital sentencing process during all of the intervening years until the Supreme court of the United States struck down the death penalty statutes of most states through its 1972 decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346.

At the time of *Furman*, I.C. § 18-4004 read:

> Punishment for murder. – Every person guilty of murder in the first degree shall suffer death or be punished by imprisonment in the state prison for life, and the jury may decide which punishment shall be inflicted. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than ten years and the imprisonment may extend to life.

In its first post-*Furman* session (1973), the Idaho legislature deleted the jury function from I.C. § 18-4004 and made all convictions of first degree murder subject to the death penalty. This was done in an attempt to remove the "cruel and unusual punishment" aspects disapproved in *Furman*. I.C. § 18-4004 was amended by striking out the words as lined out below:

> 18-4004. PUNISHMENT FOR MURDER. – Every person guilty of murder in the first degree shall suffer death ~~or be punished by imprisonment in the state prison for life, and the jury may decide which punishment shall be inflicted.~~ Every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than ten years and the imprisonment may extend to life.

The 1973 Amendment restored the law to its 1864 standing.

After the United States Supreme Court in a series of cases declared statutes of other states which were similar to Idaho's 1973 version unconstitutional, the Idaho legislature responded in 1977 with the present statutory scheme providing for inquiry into mitigating or aggravating circumstances as set forth in I.C. § 19-2515 et seq. That amendment changed the statute back to its pre-1973 language except that it omitted restoring the jury function and added the reference to I.C. § 19-2515:

> 18-4004. PUNISHMENT FOR MURDER. ~~Every~~ Subject to the provisions of 19-2515, Idaho Code, every person guilty of murder ~~in~~ of the first degree shall ~~suffer~~ be punished by death or by imprisonment for life. Every person guilty of murder ~~in~~ of the second degree is punishable by imprisonment ~~in the state prison~~ not less than ten (10) years and the imprisonment may extend to life.

Except for four states which entirely abolished capital punishment in the nineteenth century, every American jurisdiction has at least at some time employed jury sentencing in capital cases. *McGautha v. California*, 402 U.S. 183, 200 n. 11, 91 S.Ct. 1454, 1463 n. 11, 29 L.Ed.2d 711 (1971). During a period of over a century, beginning in 1838, jurisdiction after jurisdiction that retained the death penalty replaced its mandatory capital punishment law with discretionary jury sentencing, *Woodson v. North Carolina*, 428 U.S. 280, 291-92, 96 S.Ct. 2978, 2985, 49 L.Ed.2d 944 (1976) (plurality opinion). By the time of the Furman decision in 1972, Colorado was the only state in the nation to impose capital punishment without jury involvement in the sentencing process.

Despite the long history at common law and under statutory law of the states throughout this nation of

involving jury in the capital sentencing process, the Idaho legislature in the present statute enacted in 1977 totally excluded the jury from its traditional function. The legislative history shows that the legislature was not even presented with a bill which provided for jury participation. The only bill presented, was one drafted by the attorney general, Senate Bill 1082, which was presented to the legislature with the following statement of purpose:

RS 1954

S 1082

STATEMENT OF PURPOSE

Only a few years ago, the United States Supreme court made new "rules" concerning the imposition of the death penalty for serious crimes. So that we conformed with this U.S. Supreme Court interpretation of the federal Constitution, the Idaho Legislature enacted in 1973 our present death penalty Section 18-4003 and 18-4004, Idaho Code.

Then, last year, the United States Supreme court again changed the rules relating to capital punishment – after many states, like Idaho, had acted in response to its previous decision. The Court, in five cases, set forth new, more definitive rules concerning sentencing where the death penalty was sought to be imposed.

The purpose of this bill is to codify into Idaho law these present requirements imposed on the states by these most recent United States Supreme Court decisions on capital punishment so that we will conform with this latest expression of the law. (Emphasis supplied.)

The statement of purpose is misleading insofar as it suggests the the Supreme Court decisions mandated the

removal of the jury from its traditional powers and functions; the United States Supreme court never at an earlier time or in this "latest expression of the law" required jury non-involvement.

Since jury participation in the capital sentencing process is part of the right to "trial by jury" as guaranteed inviolate by Art. 1, § 7 of the Idaho Constitution, I would reverse and remand for proper sentencing and would urge the legislature to amend the statutes to provide for proper jury participation in order that future capital punishment cases will not be subject to this serious defect.

IV.

Interim Solution by District Judges

Since this Court has not seen fit to bring the Idaho sentencing process into a constitutional posture, and since the current session of the Idaho Legislature has not even formally taken up the effect of *Adamson*, we are undoubtably going to be faced with a year or more of uncertainty while we await the review of *Adamson* by the United States Supreme Court on Certiorari. Should the 9th Circuit be affirmed, then all death sentence cases in Idaho which have been imposed in that interim period will have to be reversed and remanded for resentencing, if not a total new trial. I believe there is a method whereby our Idaho district judges, exercising their intelligence and their plenary power, can bring order to this chaos and validly complete capital cases. It has always been the law of Idaho that district judges have the power to call for advisory juries in cases where juries are not mandated by statute or common law. Our district judges

could, on their own motion, adopt the procedures of the thirty-one other states by bifurcating the trial and bringing the jury in as an advisory jury at the sentencing phase. So that the jury would be fully apprised of the seriousness of its undertaking, the district judge would inform the jury that he would not impose the death penalty unless they so recommended. The district judge would, of course, retain his traditional power under Idaho law to impose a sentence less than death if he deemed such reduction appropriate. By engaging in this procedure, a district judge would not only be doing a service to the taxpayers by way of judicial economy in obviating the need for retrials or resentencing, but additionally the court would be properly serving both society and the defendant by protecting the constitutional right to trial by jury.

BISTLINE, J. dissenting.

I

In this capital murder case, where the guilt of the accused would be determined by a jury, and where a guilty verdict might be of murder in the first degree, murder in the second degree, or voluntary manslaughter, defense counsel's *first* strategic tactic was to utilize the results of a SEANCE conducted by a spiritualist; from the report of this seance counsel unquestionably believed that he had received the "true facts" concerning the homicide caused by gun shot wounds. Armed with the "true facts," counsel then devoted his talents toward convincing the prosecutors that the real culprit was not defendant, but the deceased's daughter. Having wholly

succumbed to relying entirely on that hypothesis, counsel not only forewent making any of the ordinary preparations for a defense, but, even more damaging to the defendant, exposed him for uncounseled interrogation by prosecuting authorities.

Generally, a person's willingness to learn life's past or future secrets from a spiritualist, fortune-teller, a seer or even a Ouija board, would be of no concern. However, if Charboneau's then counsel was rendering "effective assistance of counsel," as the majority today holds, then the sixth amendment's guarantee of right to counsel has flown the coop. As Chief Justice Shepard has written, there is no insurance that defendants will receive a perfect trial – there is only the guarantee of a fair trial. A fair trial cannot be had if a defendant is precluded from being represented by counsel who is knowledgeable and competent. Such was not the circumstance here. Worse yet, the defendant appears to have had no outside counselling or advice of any kind which would have informed him that he was being inadvertently escorted down the primrose path. The defendant could have fared no worse had he been in charge of his own case. The record makes it readily apparent that defense counsel simply was not aware that his efforts were bizarre, and, equally unaware that counsel's chosen course of conduct was extremely prejudicial to his client's constitutional right to remain silent.

This Court has properly recognized that the Idaho Constitution, where appropriate, can provide more pro-

tection than its federal counterpart.[7] However, the Idaho Supreme Court cannot, through the magic wand of a judicial decree, disavow or disregard the sixth amendment protections guaranteed by the Constitution of the United States.[8] Unless and until the federal courts in *habeas corpus* or post-conviction relief proceedings hereafter intercedes, the ineffective assistance of counsel doctrine in this jurisdiction has today been rendered meaningless.[9]

II

In addition, the majority has reacted to the well-reasoned decision of the *en banc* Ninth Circuit Court of Appeals in *Adamson v. Ricketts*, ___ F.2d ___ (filed December 22, 1988), by rejecting it even before there has been any review by the Supreme Court of the United States. In that manner, Charboneau and other capital defendants

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[7] *See State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (1988) (Idaho Constitution prohibits use of roadblocks designed to apprehend drunk drivers absent warrant or probable cause); *State v. Thompson*, 114 Idaho 746, 760 P.2d 1162 (1988) (Idaho Constitution prohibits use of pen registers on citizens' telephones absent warrant or probable cause).

[8] Article 1, § 3 of the Idaho Constitution provides: "The state of Idaho is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land."

[9] I concur in Parts III, IV, V, IX(B)(1) (with explanation), IX(B)(2), IX(C)(2), IX(C)(3), IX(C)(6), IX(C)(7) and dissent to Parts I, II, VI, IX(A), IX(C)(1), IX(C)(4) and IX(C)(5). I express no opinion as to Parts VII, VIII, X and XI, because a proper resolution of this case would render those issues entirely moot.

similarly situated are deprived of the fundamental right to jury sentencing guaranteed by both art. 1, § 7 to the Idaho Constitution and the sixth amendment to the Constitution of the United States. These concerns will be addressed in turn.

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Initially, the majority sets the stage for this aberration by failing to understand and utilize the proper standard of review. Under the seminal case of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 674 (1989), a criminal defendant must establish: (a) counsel's deficient performance, and (b) prejudice. With this much the majority is in accord. However, under the prejudice prong, it does *not* have to be shown that without counsel's error the defendant would have otherwise earned an acquittal. The heavy burden of such an outcome-determinative test was specifically rejected by the Supreme Court in *Strickland*. Although such a standard is appropriate for assessing a motion for a new trial based on newly discovered evidence, in regard to ineffective assistance of counsel claims, the defendant need only establish " . . . that there is a *reasonable probability* that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability *sufficient to undermine confidence in the outcome.*" 104 S. Ct. at 2068 (emphasis added).

Thus, the majority rejects *Strickland's* mandate and affixes to Charboneau the burden of proving the result of the trial would have been different absent the replete errors of commission and omission attributable to

defense counsel, specifically placing all reliance on the results of the seance and at the same time making not even a cursory attempt at preparation for an extremely crucial trial.[10]

Not only does the majority fail to comprehend the proper standard for evaluating ineffective assistance of counsel claims, it also shows little regard for the record. Without question, counsel Bennett relied upon the results provided from a seance in charting the course for his representation of Charboneau. The prosecutor who originally handled this case for Jerome County testified to his knowledge that Bennett contacted his niece in California, a clairvoyant, that through a seance the niece was able to "contact" the victim, Marilyn Arbaugh, that the spirit of Marilyn stated that her murderer was not Charboneau, but her daughter Tiffnie, and that the fatal shot was from a different gun not belonging to Charboneau. The prosecutor's testimony:

> Q. Will you, please, state your full name for the record.
>
> A. Dannis M. Adamson.
>
> Q. And where do you live?
>
> A. I live seven north, three east of Jerome.

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[10] The majority opinion states: "It is Charboneau's burden to prove that the *result would have been different,* if he had not testified at the hearing on the motion to dismiss." Slip Op. at 12 (emphasis added). Such a burden is unrealistic. Absent a retrial, that theorem is unsusceptible of proof. The fact is that defense counsel did make the decision to have Charboneau testify.

Q. Okay. And your occupation, please?

A. I'm an attorney.

Q. How long have you been an attorney?

A. Since 1979.

Q. All right. I understand you were prosecuting attorney here in Jerome for a while; is that correct?

A. That's correct. For the last part of '82 and all of '83 and '84.

Q. Okay. Dan, are you familiar with the Jamie Charboneau case?

A. I certainly am.

Q. And how is it that you're familiar with that case?

A. I was the prosecuting attorney for Jerome County representing the State of Idaho in State of Idaho versus Jamie Charboneau; three, three different counts: Grand theft, rape, and first-degree murder.

Q. Okay. And I understand that the Attorney General's office was appointed to prosecute that action sometime during the proceedings; is that right?

A. Okay. It became obvious that the trial was not going to take place before I left office because I did not rerun for the prosecutor's position; and when that decision was made, that's when the Attorney General's office came in, yes.

Q. All right. Dan, did you ever have any private conversations with Golden Bennett concerning this case?

A. Yes.

Q. Okay. And when did you have these particular conversations?

A. Well, we had various conversations ranging from, from when he was first appointed; but I talked with him regularly before the preliminary hearing, before Mr. Charboneau was bound over to District Court, conversations on a regular basis.

. . . .

Q. Dan, you said there was one particular theory that he elicited to you in a conversation. Where did it take place?

A. Well, again bits and pieces, even in the hallway, but primarily I think in my office and, the prosecutor's office.

Q. Who was present during that particular conversation?

A. Well, I'm almost certain [defense investigator] Mr. Coakley was and Golden Bennett and myself.

Q. Okay. Could you relate to the court what the substance of that conversation was?

A. Well, basically, it was: You've got to bring in the .22 revolver pistol. You have to change the focus of your investigation and take the heat off my client and place it on Tiffy, Tiffnie Arbaugh, because she's the one that shot the, made the final shot into her mother.

And my question was, well, how do you know all this? And frankly, I expected him to say that his client told him so, and in fact in some of the earlier suggestions as to how this crime had happened, he had gotten those from Mr. Charboneau. But this particular instance dealt with the fact that he had contacted his niece or cousin or something like that in California, that she conducted a seance and that she had communicated with Marilyn Arbaugh, the victim in the case, and that Marilyn had indicated how much she loved Jamie Charboneau, and that even though she was upset that her daughter had shot the

final shot, she also forgave her because she knew how much she had hurt her, et cetera, et cetera, et cetera. And it was kind of a long drawn-out statement as to what this dead person had said through the seance, trying to convey her love to Jamie Charboneau, and forgiving her daughter for shooting her.

Tr., Vol. 23, Post-conviction Relief Hearing, 57-62.

Mr. Bennett's secretary also testified. She stated that much of the pre-trial defense was concentrated on summoning assistance from the world of the supernatural. Her testimony on post-conviction proceedings was corroborative of the prosecutors.

Q. Okay. Are you familiar with a Jamie Charboneau case?

A. Yes.

Q. How is it that you're familiar with that?

A. Well, I worked for Golden for about four months in '84 and the first part of '85 when he was defending Jamie.

Q. Okay. Golden was representing Jamie during this entire time; is that correct?

A. Yes.

Q. Did you ever witness any conversations between Golden Bennett and his investigator James Coakley?

A. Yes.

Q. Okay. And where were these conversations? Where did they take place?

A. In Golden's office.

Q. All right. And who was present at the time?

A. Golden, Jim Coakley, Golden's daughter-in-law Jean, myself, Peggy, I can't tell you who was there

every, you know, for every conversation, but people that work in the office.

Q. Okay. When did these conversations take place?

A. Well, they'd – the whole time that I was working there on several occasions.

Q. Were they frequent, all the time? Were they now and then? What were they?

A. They were frequent. That was the case that, Golden's big case he was working on when I was there. They talked about it a lot.

Q. Okay. And would you relate to the Court the substance of these conversations?

A. Well, they were planning their strategy, what, how they were going to try to help Jamie with the information that Jim Coakley was furnishing Golden.

Q. And what was that?

A. Well, he was trying to contact the deceased's spirit on several occasions. He said that it was an unfriendly spirit. And then one day we came to work and he said that he'd contacted her the night before and as far as I know that's what Golden was basing his information on.

Q. Okay. Did they talk about clairvoyants during this period of time?

A. Yes.

Q. Often?

A. Yes.

Q. Okay. And did you hear Golden Bennett talk about clairvoyants?

A. Yes. Not as much as Jim did, but, yes.

Tr., Vol. 23, Post-conviction Relief Hearing, 163-65.

Defense counsel was preoccupied with using the results of a seance in preference to utilizing the traditional measures relied upon by defense lawyers: fact investigation coupled with legal research. Moreover, rather than independent investigation of the circumstances of the case, defense counsel approached the Attorney General's office in an attempt to persuade the State to investigate. As defense counsel explained in his deposition:

> My purpose in going to Boise was to convince the attorney general's office that an independent investigation was needed, and that it wouldn't be done properly in Jerome County, *and I had complete faith in the attorney general's office, I still do,* and it just seemed like the appropriate way to go at the time.

Deposition of Golden Bennett at 27 (emphasis added). *Thus, instead of accepting the responsibility of embarking on his own factual investigation, defense counsel relied upon the prosecutorial arm of the State to do it for him.* The lack of investigation and preparation for trial is also shown by the testimony of Randy Stoker, the attorney who ultimately, and on short notice, represented Charboneau at trial:

> I picked up that case in a posture *where there had been virtually no investigation done,* there were no readable, credible witness statements in the file. *There were no jury instructions prepared.* Jaimi had never been examined by a psychiatrist or psychologist. *There was no ballistics experts hired. There were no pathological testimony from a defense standpoint.* There was nothing in terms of what I would consider assistance to me at that point in the file that I was handed from his previous counsel.

Vol. II, Post-conviction Relief Hearing at 27 (emphasis added).

The American Bar Association's "Defense Function" upon which the majority heavily relies, provides that:

> *It is the duty of the lawyer to conduct prompt investigation of the circumstances of the case* and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. *The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities.* The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

Standard 4-4.1 (1982) (emphasis added). While the standard makes clear that the defense attorney should try to secure information and evidence through discovery, an *independent* investigation is also required. *Otherwise, if it be true that the prosecution can properly be relied upon to do all of the investigative tasks for an accused, the adversarial nature of our criminal system of justice breaks down.* As observed in *Strickland*, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the *adversarial process* that the trial cannot be relied on as having produced a just result." 466 U.S. at 686, 104 S. Ct. at 2064 (emphasis added).

In *Kimmelman v. Morrison*, 106 S. Ct. 2574 (1986), the Supreme Court was asked whether a defense counsel's failure to file a timely suppression motion, due to a lack of investigation, constitutes ineffective assistance of counsel. The Court held that it did:

> The justifications Morrison's attorney offered for his omission betray a startling ignorance of the law—or a weak attempt to shift blame for inadequate preparation. '[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' [citations] Respondent's lawyer neither investigated, nor made a reasonable decision to investigate, the State's case through discovery. Such a complete lack of pretrial preparation puts at risk both the defendant's right to an ' "ample opportunity to meet the case of the prosecution," ' [citations] and the *reliability of the adversarial testing process.*

106 S. Ct. at 2588-89 (citations omitted) (emphasis added).

Defense counsel not only failed to investigate, but he also subjected his client to examination by the State for no legally recognizable purpose. Moreover, at defense counsel's invitation the State was allowed to interrogate Charboneau for two hours, without defense counsel being present. The scope of the questioning was not limited and Charboneau was left to fend for himself. The majority readily and properly concedes that "Charboneau divulged a great many more particulars concerning the alleged kidnapping, theft and murder." Slip Op. at 6.

Defense counsel also called Charboneau to the stand to testify at the preliminary hearing, thereby waiving the constitutional right to remain silent. The majority says of this strange affair, "[w]hile it may not have been the game plan that other attorneys would have followed, we may not second guess counsel's strategic and tactical choices." Slip Op. at 12. The majority is only half right in stating that premise. True, unsuccessful but reasonable tactical decisions should not be the basis for finding ineffective assistance of counsel, but only so long as the

strategic choices have some *plausible basis in the record*. As this Court's opinion in *Aragon v. State (Aragon II)*, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988) stated: "When counsel's trial strategy decisions are made upon the basis of inadequate preparation, ignorance of the applicable law, or other shortcomings capable of *objective* evaluation, the defendant may very well have been denied effective assistance of counsel" (quoting *State v. Tucker*, 97 Idaho 4, 10, 539 P.2d 556, 562 (1975) (emphasis added in *Aragon* II)).

This case stands in stark contrast to *Aragon II*, where the ineffective assistance contention lay in failing to call witnesses to bolster the accused's character. The decision not to call character witnesses was reasonable, so it was held, because counsel, associate counsel and an investigator had interviewed Aragon's family and people that knew him; thereafter, *counsel made the informed decision* that the defense would not be helped by calling such persons. 114 P.2d at 763, 760 P.2d at 1179. Unlike *Aragon II*, however, *defense counsel in the instant case engaged in no independent factual investigation* upon which to base principled strategic decisions.

The majority concludes that defense counsel's performance was effective because nothing contained in the American Bar Association's standards prohibits counsel from placing the accused on the stand as a witness at the preliminary hearing. However, as the High Court made clear in *Strickland*:

> Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed.

> 1980) ('The Defense Function'), are guides to determining what is reasonable, *but they are only guides.* No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

104 S. Ct. at 2065 (emphasis added). Indeed, a case may arise where it is in the defendant's interest to testify at the preliminary hearing. However, in the case at bar no reason for calling Charboneau to testify has surfaced, other than as it might somehow induce the Attorney General to investigate the case with the thought in mind that the murderer was not Charboneau.

Subjecting the unrepresented defendant to the State's questioning on two occasions was not enough. Defense counsel also put Charboneau on the stand when the Motion to Dismiss was heard. Defense counsel, however, was certain that the Motion to Dismiss would not be granted. His purpose was only to embarrass the prosecution into conducting a more thorough investigation along the aforesaid avenues. However, anything Charboneau might say in such circumstance later could then be used to impeach him at trial if he were to testify. One expert witness, practicing attorney and formerly a judge, Lloyd Webb, stated that defense counsel's decision to place Charboneau on the stand in order to embarrass the prosecution was: *"Nonsense. You don't embarrass prosecutors into making proper investigations that way. This is not a judgment call. This is just plain incompetency. I can't understand Mr. Bennett and why he did that."* Vol. I, Post-conviction Hearing at 56 (emphasis added).

Thus, Charboneau was denied effective assistance by the defense counsel's: (a) placing unbridled reliance on the report given to him as to the results of the seance in formulating the "defense" which he conducted; (b) failure to investigate the facts of the case, proceed with discovery, and generally make the necessary preparations for trial – as against merely relying on the prosecution to investigate the case along the lines defense counsel outlined, thereby undermining the adversarial nature of the criminal justice system; and (c) allowing the state the unfettered opportunity to interrogate Charboneau without counsel being present; and (d) calling Charboneau as a witness at the preliminary hearing and hearing on the motion to dismiss absent any plausible basis for so doing.

B. FAILURE TO STRIKE EVIDENCE OF GRAND THEFT AND KIDNAPPING CHARGES

The majority holds that evidence of the felony charges of kidnapping and grand theft was properly not stricken, even though both charges were dismissed at the close of the prosecution's case for lack of jurisdiction. It is said that such evidence shows Charboneau's motive or intent under I.R.E. 404(b). The majority opinion supplies the trial court's reasoning for not granting the motion: "The court denied the motion on the ground that the evidence would have been admissible in the murder case in any event." Majority Slip Op., p.7. On page 24 of the Majority Slip Opinion is added to the foregoing this sentence: "This thing occurred over a period of some ten or twelve days and I think the jury needs the benefit of all that testimony in order to properly arrive at a decision, whichever way they decide."

The majority then disposes of this extremely crucial evidence by recounting the facts of an earlier (1979) case which – wholly unlike this case – was in large part based on circumstantial evidence. A burned torso, minus head and legs, was discovered, and authorities made a tentative identification that the corpse was the remains of one Ron Needs. This led to the arrest of Sally Needs, and thereafter a trial on a charge of murder. The prosecution proved the identity of the corpse to the satisfaction of the jury by circumstantial evidence.

Sally Needs was convicted based on the testimony of a witness who in mid-June saw Sally Needs arm herself with two butcher knives, and brandish them at Ron Needs, who disarmed her. The witness testified that Mrs. Needs threatened that she was going to get him – also then throwing gasoline on him. On appeal Sally Needs contended that the trial court erred in allowing in the testimony of the assault, which was established as having been two weeks prior to Ron Need's death. This Court held that it was not error to allow the testimony, the rationale being that "[s]uch evidence is clearly relevant to her motive and intent as well as to shed considerable light on her mental attitude towards Ron Needs." 99 Idaho 883, 893, 591 P.2d 130, 140 (1979). Although that language is somewhat overbroard, it met with my approval then, and continues to. That was an unusual set of circumstances.

Here we have a homicide which took place with witnesses in the area. What I remember best in the *Needs* case is the statement that "Idaho courts do follow the general rule *that evidence of other unrelated criminal activity is inadmissible at trial to show criminal propensity on the part*

of the accused." 99 Idaho 883, 892, 591 P.2d 130, 139 (1979) (emphasis added).

Here, the two charges of kidnapping and a grand theft, neither related to the homicide, were both alleged to have taken place when Charboneau on June 21, 1984, entered his former wife's car and drove off with her the car allegedly keeping her captive until she escaped. The car was alleged to be valued at over $150.00.

Those two unrelated charges were *not* filed in connection with the July 1 homicide charge which was later filed on July 2, 1984. It was defense counsel who conceived that strategic "tactic" of promoting a single trial of all three charges. As pointed out in Mr. Fuller's opening brief in this Court, the district court attempted to dissuade defense counsel from such foolishness:

> [T]he Court acknowledged that it was improper to consolidate the three criminal trials and that Jaimi was going to be prejudiced. He stated:
>
> > And I might further add, if Mr. Charboneau will recall, I did my level best and *even fought with counsel to separate these trials.* I didn't want them all held together; I wanted to separate the one from the other. And Mr. Charboneau and counsel wanted it held together. So that's one of the problems we run into by holding it together. Objection overruled.
>
> Trial Tr., Vol. II, p. 375, L. 4-11 (emphasis added).

Upon the State resting its case, Mr. Stoker moved to dismiss the kidnapping and grand theft charges on jurisdictional grounds that had been discussed early in the trial with the trial court judge. Both charges were dismissed because jurisdiction was wholly lacking. Then Mr. Stoker attempted to strike the evidence concerning the issues involved in the grand theft and

kidnapping counts that he had tried to exclude earlier. In response to Mr. Stoker's Motion to Strike, the Court stated:

> There is no evidence whatsoever that all or any part of the crime occurred in Jerome County, and that would – jury would have to speculate as to that, it would be pure speculation. That's why I'm taking it away from them . . . I am concerned about the defense' motion to instruct the jury. (Motion to Strike) I think that I would have to so instruct them, because – and here is another part – *this is the thing that bothered me about this case a long time ago, is when the defense was always wanting to join all of these cases for trial.* I turned down that Motion I don't know on how many occasions. Finally, at the last session when you were together where the state joined and the defense joined, I allowed it to go through. *It bothers me that the jury does have in their minds all of the other evidence . . . and I don't know if I can cure that with an instruction.*

Trial Tr., Vol 6, p. 1361, LL. 20-25, p. 1352, LL. 1-15.

. . . .

> When one considers all of the facts, the bottom line is that the defendant was prejudiced and could have received a verdict other than first degree murder. In fact, there was an extremely good possibility that the defendant could have been convicted of voluntary manslaughter.

Appellant's Brief at 247-50 (emphasis added).

C. JURY DETERMINATION OF LIFE OR DEATH

The majority continues to repudiate the mandate of art. 1, § 7 of the Idaho Constitution, thereby robbing the capital defendant of the right to a jury trial. The life or death decision had always been within the exclusive

province of the jury in Idaho, until the legislature in 1977 passed the current version of I.C. § 18-4004, drafted and sponsored by the Attorney General. The steady stream of dissents from Justice Huntley and later myself beginning with *State v. Creech*, 105 Idaho 363, 670 P.2d 463 (1983), have failed to persuade a majority of this Court, or the legislature, that the Idaho Constitution requires jury participation in capital sentencing.

Today the majority takes on bigger game and now rejects the sound reasoning of the *en banc* Ninth Circuit Court of Appeals in *Adamson v. Ricketts*, ___ F.2d ___ (filed December 22, 1988), holding that the Arizona capital sentencing scheme – remarkably similar to Idaho's – violates the sixth amendment right to a jury determination of each element of the offense charged.

In *Admason* the Ninth Circuit stated:

> Under Arizona's revised code, all murder is not capital murder. Since 1973, Arizona has required that *before a death sentence may be imposed* the trial judge must find beyond a reasonable doubt that at least one statutory aggravating circumstance exists. While Arizona has formally subdivided murder into at least four categories – first degree murder, second degree murder, manslaughter and negligent homicide – it appears that aggravating circumstances in fact operate to create an additional category of murder. While the statute's nomenclature ('aggravating circumstances') suggests they are mere factors guiding the judge in his or her determination of the appropriate penalty, all other indicators confirm that aggravating circumstances are additional *elements* necessary for a finding that a defendant is guilty of the distinctive offense of capital murder. Finding aggravating circumstances results in the only crime in Arizona for which a defendant may receive a death sentence.

___ F.2d at ___ (filed December 22, 1988) (emphasis and parentheses in original; footnotes omitted). Like Arizona's aggravating circumstances, Idaho's capital sentencing statute. I.C. § 19-2515, constitutes elements of the crime of capital murder. Simply put, an Idaho citizen cannot be put to death unless the evidence establishes an aggravating circumstance, the *sine qua non* of capital murder. Accordingly, when the presence of such an element is determined by a trial judge – and not a jury -- the right to a jury trial guaranteed by the Idaho and federal constitutions is violated.

A majority of the Court, however, shuns *Adamson* on the basis of the Supreme Court's decision in *Spaziano v. Florida*, 104 S. Ct. 3154 (1984), which held that judge-sentencing in capital cases does not violate the eighth amendment prohibition against cruel and unusual punishment. However, in *Adamson* the Ninth Circuit convincingly demonstrates that the

> [Supreme] Court's examination in *Spazizno* was limited to the constitutionality of judicial 'sentencing' and evaluation of 'the appropriate punishment to be imposed.' 468 U.S. at 458-59. *The Court never addressed a claim of judicial fact-finding as to an element of the offense. Thus the Court never reached the particular contention Adamson raised*: that Arizona's capital sentencing statute requires the judge to determine elements of the offense charged, thereby taking this factual element out of the jury's hands in violation of the Sixth Amendment. Sentencing, or the ultimate determination of an appropriate penalty, involves the *weighing* of factors. Such weighing is completely distinct from threshold findings of whether requisite elements even exist from which the trier-of-fact draws conclusions on guilt or innocence.

> *Thus, Spaziano is not controlling in this case, as it left untouched the question of the right to a jury trial* where the aggravating circumstances of a state's death penalty statute are elements of a capital offense.

___ F.2d ___ (footnote omitted)(emphasis added). The ultimate outcome is, of course, up to the Supreme Court of the United States, but whatever it may be, that Court surely will address the issue as one of first impression, and not "inherently" mandated by *Spaziano* as the majority of this Court today erroneously concludes.

D. THE HEARSAY LETTER FROM THE VICTIM'S FATHER

The majority holds that the letter written by the victim's father and admitted at the penalty phase of the trial was inadmissible hearsay. With that much I agree However, a majority of this Court adheres to the view that hearsay contained in a presentence investigation report can properly be considered by a trial judge weighing aggravating against mitigating circumstances.

Idaho Code § 19-2516 provides:

> **Inquiry into circumstances – Examination of Witnesses.** – The circumstances *must be presented by the testimony of witnesses examined in open court,* except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section.

(Emphasis added.) I remain convinced that the mandate of the legislature expressed in I.C. § 19-2516 and that of the founding fathers expressed in the due process clauses of the state and federal constitutions prohibits the admission of presentence investigation reports obtained by hearsay and containing hearsay. As stated on an earlier occasion:

> [T]he Court simply cannot in any show of conscience continue to let capital sentencing be hinged on unsworn statements and other forms of hearsay. It is now clear that a capital case involves two trials. The first is to try the issue of the accused's guilt. If convicted, the second is to try the issue of the circumstances of his crime and the facets of his character. Common sense dictates that the second trial for his life is the defendant's more important trial. Can it be then that in Idaho we have a rule that while due process obtains at the guilt trial, anything goes at the second trial which determines the issue of life and death? Until recently, I had thought that removing the element of due process from the second trial was such a monstrous proposition as to be undeserving of discussion or comment.

State v. Sivak, 105 Idaho 900, 920-21, 647 P.2d 396, 416-17 (1983) (Bistline, J. dissenting).

It seems exceptionally clear to me that unless the system has broken down to the point where it is permissible to allow a jury – as the sentencing authority – to have placed before it anything and everything which a presentence investigator comes across or can stir up, then, and only then, should a district judge as sentencing authority likewise be so influenced.

E. VAGUENESS OF AGGRAVATING CIRCUMSTANCES

The cruel and unusual punishment prohibitions of the state and federal constitutions require that the sentencer's discretion in imposing the death penalty limited to "minimiz[e] the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 108 S. Ct. 1853 (1988). The Supreme Court has held that the statutory aggravating circumstances, such as those in I.C. § 19-2515, must be given a limiting construction if the state is to meet its constitutional obligation "to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 1764, 64 L. Ed.2d 389, 406 (1980).

Idaho Code § 19-2515(g) provides:

> The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed.
>
> . . . .
>
> (5) The murder was *especially heinous, atrocious or cruel, manifesting exceptional depravity.*
>
> (6) By the murder or circumstances surrounding its commission, the defendant *exhibited utter disregard for human life.*

(Emphasis added.) In regard to the (g)(5) aggravating circumstance, the majority concludes that the following limiting construction passes constitutional muster:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter

> indifference to, or even enjoyment of, the suffering of others. *What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies – the conscienceless or pitiless crime which is unnecessarily torturous to the victim.*

Slip Op. at 38 (quoting *State v. Osborn*, 102 Idaho 405, 418, 631 P.2d 187, 200 (1981) (emphasis in original).[11]

The limiting construction given to the (g)(5) aggravating circumstance by *Osborn* and reaffirmed today by the majority, is wholly insufficient to guide the sentencer's discretion in limiting the application of the death penalty consistent with constitutional mandates. Terms beget terms. What is the *"norm"* of capital felonies? Who sets this "norm"? Indeed, *all* first degree murders involved the unlawful killing of another with malice aforethought. What sets this particular murder apart – not from other crimes – but from the "norm" of *first degree murder*? In a domestic dispute husband kills wife with a gun. Do all such murders now warrant execution? If so, it can hardly be said discretion is limited.[12]

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[11] The *Osborn* majority adopted this limiting construction to a very similar aggravating circumstance of the Florida Supreme Court in *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. den.*, 416 U.S. 943, 94 S. Ct. 1951, 40 L. Ed.2d 295 (1974).

[12] The *Adamson* court, reviewing Arizona cases applying similar "heinous and/or depraved" language *convincingly demonstrated* that the words themselves are empty vessels capable of being filled by a court as it chooses with *any facts* at hand. *Adamson*, Slip Op. at 15676, ___ F.2d at ___.

Also, the *Osborn* "limiting" definition of the (g)(5) circumstance provides that the murder must be "unnecessarily *torturous* to the victim." Clearly, however, this definition is simply duplicative of the (g)(7) circumstance which subjects defendants to death for murder by torture.[13] In the final analysis, *all* first degree murders are "especially heinous, atrocious or cruel, manifesting exceptional depravity." Nothing in the majority's interpretation restricts the broad brush with which the subsection is drawn.

The (g)(6) aggravating circumstance, which requires that the defendant exhibit "utter disregard for human life," suffers from similar infirmities. Today the majority reaffirms the "limiting" construction enunciated in *Osborn*:

> We conclude instead that the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the *utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer.*

Slip Op. at 39 (emphasis added) (quoting *Osborn*, 102 Idaho at 41°, 631 P.2d at 201). What first degree murderer fails to show "callous disregard for human life"? I suppose this would be the "pitiful" slayer, who, prior to delivering the fatal blow, tells the victim: "Excuse me,

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[13] Idaho Code § 19-2515(g)(7) provides: "The murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b)(c)(d)(e) or (f), and it was accompanied with the specific intent to cause the death of a human being." Idaho Code § 18-4003(a) is the murder by torture statute.

pardon me, I know it's inconvenient, but I must now take your life."

Furthermore, the (g)(5) and (6) aggravating circumstances are duplicative. *Every* murderer who exhibits "utter disregard for human life" commits a crime which is "especially heinous, atrocious or cruel manifesting exceptional depravity." Today, however, the majority in *State v. Fain* (1989 Opinion No. ___), concludes that the aggravating factors describe two "quite *different* kinds of culpability." The majority states:

> The particularly cold-blooded killer *need not* act sadistically or in a particularly *outrageous fashion* in order to commit a killing with *utter disregard for human life*. One who commits a crime in an especially heinous way is punished for the heinousness of his crime, not because he acted with utter disregard for human life, although it may be expected that most especially heinous, atrocious or cruel murders will have been committed with utter disregard for human life.

Fain, Slip Op. at 32 (emphasis added).

Thus, according to the majority, a "cold-blooded killer *need not*" act in an "outrageous fashion" to commit a murder "with utter disregard for human life." I cannot fathom a first degree murder which is not carried out in an "outrageous fashion". Every premeditated murder is outrageous.

The (g)(5) and (6) subsections are nothing more than kitchen sink aggravating circumstances which enable the state to make *every* first degree murderer not just a candidate for, but an actual recipient of, the harshest and most final of all criminal penalties. As a result, the mandate to narrow the class of death-eligible murders is abandoned.

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. JAIMI D. CHARBONEAU, Defendant-Appellant.	ORDER DENYING PETITION FOR REHEARING NO. 16339/16741 Reh. No. 89RH-1

The Respondent having filed a PETITION FOR REHEARING on April 25, 1989 and supporting BRIEF on May 17, 1989 of the Court's Opinion released April 4, 1989; therefore, after due consideration,

IT IS HEREBY ORDERED that Respondent's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 25th day of May, 1989.

By Order of the Supreme Court

/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Phillip M. Becker

I, Frederick C. Lyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Order entered in the above entitled cause and now on record in my office.

WITNESS my hand and the Seal of this Court 7-17-89

FREDERICK C. LYON Clerk

By: /s/ Lois Dawson Deputy

(p. 222) there is no way to effectively impeach or counteract it.

I object to it.

MR. HAWS: If I may respond briefly. There's been a lot of hearsay introduced here at sentencing and there is no way we can get around that in order for the Court to have a complete perspective of what has gone on before. The defense presented many witnesses. They have presented a lot of hearsay evidence. The Court has correctly, I think, pointed out over my objections that it is hearsay, you acknowledge it is, but you will take that into consideration as you weigh that which is relevant from that which is irrelevant. I think under the statute the witness has a right, your Honor, to be able to address the Court under oath and to adopt this statement as his own.

THE COURT: I will admit it, again, taking into consideration that probably great portions of it may be hearsay and stimulated by some prejudice and sympathy, and I will take that into consideration when reviewing it.

MR. HAWS: Thank you, Judge.

(State's Exhibit B admitted.)

BY MR. HAWS:

Q. Now, Mr. Arbaugh, let me ask you with regard to this exhibit that has been admitted, State's Exhibit B, you do adopt that as your full statement?

A. Yes, sir.

St Ex B Admtd
J.Arbaugh,Plf,Di

EXCERPTS FROM BRIEFS FILED ON APPEAL BY RESPONDENT CHARBONEAU

(p. 78) choose, or decline, to premeditate, to act callously, to attack a vulnerable victim, to commit a crime while on probation, or to amass a record of offenses. . . .In contrast, the fact that a victim's family is irredeemably bereaved can be attributable to no act of will of the defendant other than his commission of homicide in the first place. Such bereavement is relevant to damages in a civil action, but it has no relationship to the proper purposes of sentencing in a criminal case. *People v. Levitt*, 156 Cal. App 3d 500, 516-517, 203 Cal. Rptr. 276, 287-288 (1984).

It is true that in certain cases some of the information contained in a VIS will have been known to the defendant before he committed the offense. As we have recognized, a defendant's degree of knowledge of the probable consequences of his actions may increase his moral culpability in a constitutionally significant manner. See *Tison v. Arizona*, 481 U.S. ___, (1987). We nevertheless find that because of the nature of the information contained in a VIS, it creates an impermissable risk that the capital sentencing decision will be made in an arbitrary manner. At pp. 155-156.

While the principal case does not involve a victim impact statement (VIS) per se, Jim Arbaugh's letter certainly serves the same purpose. In fact, the principal case represents an even more flagrant violation of the defendant's rights in that its admission and consideration by the Court is in direct violation of Idaho Code §§ 19-2515(d) and 19-2516, which together dictate that only live testimony and the (p. 79) pre-sentence investigation may be considered by the Court. Jim Arbaugh's letter clearly does not fall into either of those categories.

Therefore, the District Court violated Idaho Code § 19-2515(d) and Idaho Code § 19-2516 in admitting the letter in question, while at the same time, violating defendant's Sixth Amendment rights by admitting evidence that was clearly hearsay and which could never be effectively impeached or counteracted through cross-examination or production of testimony. And, finally, by admission of the letter in question, the Court violated defendant's Eighth Amendment rights, in that the information presented in said letter was irrelevant to a capital sentencing decision, and its admission created a constitutionally unacceptable risk that the sentencer might impose the death penalty in an arbitrary and capricious manner.

APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE DISTRICT COURT ERRED IN MAKING CERTAIN OF ITS FINDINGS IN CONSIDERING THE DEATH PENALTY UNDER I.C. § 19-2515

Certain of the District Court's "Findings of the Court in Considering the Death Penalty Under I.C. § 19-2515," affixed hereto as Appendix "A", are invalid. A number of the aggravating circumstances found by the Court are not listed by I.C. § 19-2515 as permissible aggravating circumstances; certain

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(p. 9) *ISSUES PRESENTED ON APPEAL*

SENTENCING

I.

Does imposition of the death penalty with no participation by the jury in the sentencing process violate the Sixth, Eighth and Fourteenth Amendments?

II.

Was Appellant's sentence unconstitutionally imposed because he was denied a jury determination of the aggravating circumstances enumerated in I.C. § 19-2515(g)?

III.

Did the District Court err in allowing hearsay evidence to be admitted at the mitigation/aggravation hearing and were such actions on the part of the District Court contrary to I.C. §§ 19-2515 and 19-2516 and other State and Federal laws and in violation of defendant's Sixth and Eighth Amendment rights?

IV.

Did the District Court err in making certain of its Findings in considering the death penalty under I.C. § 19-2515, and if so, should Appellant's death sentence be reversed?

V.

Did the determination of defendant's eligibility for a death sentence, established by a Finding that his crime was "especially heinous, atrocious, and cruel thereby manifesting exceptional depravity" violate his Eighth Amendment Constitutional rights?

> (p. 73) A judgment by a court must conform strictly to statutory provisions, and any variation, either in the character or the extent of the punishment imposed, renders the judgment void.

Weems v. United States, 217 U.S. 349, 54 L.Ed. 793, 30 S.Ct. 544.

> 4. An "illegal sentence" is either a sentence imposed by a court without jurisdiction; a sentence which does not conform to the statutory provisions, either in the character of the term of the punishment authorized; or a sentence which is ambiguous with respect to the time and manner in which it is to be served.

State v. Thomas, 239 Kan. 457, 720 P.2d 1059, 1060 (1986)

Finally, carrying the argument to its logical conclusion, Appellant contends that the erroneous interpretation and subsequent imposition of Idaho Code § 19-2515(c), violated his rights to due process, guaranteed under the Fourteenth Amendment to the Federal Constitution and Article 1, § 13 of the Idaho State Constitution.

Several Supreme Court cases support this contention:

The United States Supreme Court in *Williams v. People of the State of New York*, 69 S.Ct. 1079, 337 U.S. 241, 93 L.Ed. 1337 (1949) stated as follows:

> Sentencing procedure was subject to scrutiny under due process clause, and highest state court to which case was brought by appeal had power to reverse for abuse of discretion or legal error in imposition of sentence,. . . .Penal Law N.Y. §§ 1044, 1045, 1045-a; Code Cr. Proc. N.Y. §§ 482; U.S.C.A.CONST. AMEND. 14.

EXCERPTS FROM STATE'S APPEAL BRIEFS

(p. 25) respect for the law, that a former employer in Montana was not surprised that Charboneau had committed such a crime, that his military records had been inadequately investigated, and that the law enforcement authorities of the county had not done all they could have done to prevent the crime.

The trial judge indicated that the weight of the letter would be substantially affected, in the court's consideration of it, by its hearsay nature and by the bias of the writer. (Sentencing Hearing Tr., pp.220-222.) The court took no account of the letter in its sentencing findings. It did not rely on any of the factual matters asserted, nor did the opinions of the writer appear in any manner to have affected the court's findings. Accordingly, if the letter were erroneously admitted the error would be harmless because it had no material effect on the outcome. *See, State v. LePage,* 102 Idaho 387, 630 P.2d 674 (1981); *cf., Delaware v. Van Arsdall,* 475 U.S. 673, 89 L.Ed.2d 674 (1986) ("the virtually inevitable presence of immaterial error"); *United States v. Hasting,* 461 U.S. 499 (1983) (there is no such thing as an error-free trial and the Constitution does not guarantee such a trial).

Moreover, the relevance of most of the information contained in the letter is beyond debate. Sentences are to reflect both the nature of the offense and the character of the offender, *State v. Johnson,* 101 Idaho 581, 618 P.2d 759 (1980), for which reason the sentencing court must be given access to the broadest range of information available about the defendant, *Roberts v. United States,* 445 U.S. 552, 63 L.Ed.2d

(PETITION FOR REHEARING, Page 2) the evidence, and the court's view of the process of weighing aggravating and mitigating factors.

II

The Court's Decision Limits the Receipt Of Hearsay Evidence At Sentencing In Violation Of Precedent And Statute.

Three judges of this court agree that hearsay evidence may not be received at sentencing, unless, at least, it has been included in the presentence investigation report. This determination is contrary to a long line of case and statutory authority and practice.

Since the decision of the United States Supreme Court in *Williams v. New York*, 337 U.S. 241 (1949), it has been clear that there is no constitutional bar to the receipt of hearsay evidence in the sentencing proceeding. The protection afforded to the defendant and his assurance of reliability lie in the circumstances that the defendant must have an opportunity to respond to any hearsay evidence and the sentencing court has an obligation to assure itself of the reliability of the evidence on which its findings are based. The authority was reviewed at length in respondent's opening brief and we do not repeat it here. We ask, however, that the court consider again the argument made there. A blanket prohibition on hearsay evidence, except to the extent that it is introduced by the presentence investigator, takes no account of the actual reliability of proffered evidence. Such a rule simply *excludes* evidence even though its accuracy and trustworthiness may be beyond doubt. (PETITION FOR

REHEARING, Page 3) Nothing favorable can be said of a legal precept having the effect of preventing the fact finder from considering all the relevant facts.

In *State v. Creech*, 105 Id. 362, 670 P.2d 463 (1983), the court recognized the principle that all evidence which bears on the sentencing decision should be before the court. The present decision conflicts with that holding. Moreover, the public, acting through its representatives in court, is *entitled* to have all relevant evidence considered in the sentencing proceeding, whether it is hearsay or not. See *Williams v. New York, supra, Roberts v. United States*, 445, U.S. 552 (1980) *Mullaney v. Wilbur*, 421 U.S. 684 (1975), *United States v. Tucker*, 404 U.S. 443 (1972), *Williams v. Oklahoma*, 358 U.S. 576 (1959), *United States v. Grayson*, 438 U.S. 41 (1978). Idaho Code § 19-2515, § 19-2516.

The court has construed Idaho Code § 19-2515(d) "to permit the parties in a formal sentencing hearing to present all relevant evidence that would *otherwise be admissible.*" (emphasis added).

The court's interpretation does violence to the plain language of the statute. Idaho Code § 19-2515(d) states: "at such [sentencing] hearing, the state and the defendant shall be entitled to present *all relevant evidence* in aggravation and mitigation." The statute plainly does not restrict sentencing evidence to that which would be admissible under rules of evidence applicable at trial. Additional evidence that the

(PETITION FOR REHEARING, Page 9) *Stephens*, 462 U.S. 862 (1983). This court has previously held that once the sentencing threshold is crossed "it is within the sentencer's discretion to balance aggravating and mitigating circumstances, not pursuant to any special standard." *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983) *Cert. Denied* 468 U.S. 1220 (1984).

Resort to a sentencing system involving statutory aggravating factors is an incident of federal constitutional law. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Godfrey v. Georgia*, 466 U.S. 420 (1980). The finding of statutory aggravating factors begins the inquiry into whether the death sentence shall be imposed. After that point, the court must have some discretion to apply factors of leniency, *Lockett v. Ohio*, 438 U.S. 586. Within those strictures, a state has the discretion to structure its system in its own way. *Cabana v. Bullock*, 474 U.S. 376 (1986).

The Idaho statute provides that "where the court finds *a* statutory aggravating circumstance, the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust." (emphasis added)

What is called for by the statute is a simple, commonsense judgment by the trial court whether, given the presence of a statutory aggravating factor, there is nonetheless sufficient extenuation that the death sentence should not be imposed. Cf.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-151

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

* * * * * *

THE STATE OF IDAHO,

Petitioner,

vs.

JAIMI DEAN CHARBONEAU,

Respondent.

* * * * * *

On Writ of Certiorari To The

Supreme Court of the United States

* * * * * *

BRIEF IN OPPOSITION

* * * * * *

Greg J. Fuller
Fuller Law Offices
P. O. Box 30
Jerome, Idaho 83338
(208) 324-8193
Attorney for Respondent

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OPINION BELOW

The Idaho Supreme Court, in 1989 Opinion Number 44 (Appendix 1 - 79), reversed Jaimi Charboneau's death sentence for the following reasons: (1) The Rule of Booth v. Maryland, 428 U.S. 496 (1987) was violated when the sentencing Court admitted into evidence a letter from the murder victim's father which sets forth the family members' opinions and characterizations of the crime and of the defendant. The letter also noted the impact of the crime on the victim's daughter; (2) Hearsay evidence may not be considered by a sentencing judge in a capital proceeding unless such evidence has been made a part of a presentence investigation report in strict compliance with the state's death penalty sentencing statutes, and in death penalty cases "a strict compliance with the procedures for sentencing is required." (Appendix 33); (3) Pursuant to the Idaho Death Penalty Statute, the judge must weigh "all the mitigating circumstances presented...against each of the [statutory] aggravating circumstances separately." (Appendix 42); (4) There is no evidence in the record to support a critical portion of the sentencing Judge's Findings of Fact. (Appendix p. 38)

The decision is still unpublished and has been included in Appendix 1 - 79.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Idaho Code Section 19-2515 provides, in pertinent part:

> (c) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

(d) In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitted may be repeated or amplified if necessary to complete the record.

Idaho Code Section 19-2516 provides as follows:

Inquiry into circumstances - Examination of witnesses. - The circumstances must be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section.

Idaho Criminal Rule 32 provides, in pertinent part:

The following standards and procedures shall govern presentence investigations and reports in the Idaho courts:1
(b) Contents of a presentence report. A trial judge may request a record check and other background information concerning the defendant prior to sentence without conducting a full presentence investigation of the defendant. However, whenever a full presentence report is ordered, it shall contain the following elements:

(1) The description of the situation surrounding the criminal activity with which the defendant has been charged, including the defendant's version of the criminal act and his explanation for the act, the arresting officer's version or report of the offense, where available, and the victim's version, where relevant to the sentencing decision.
(2) Any prior criminal record of the defendant.
(3) The defendant's social history, including family relationships, marital status, age, interests and activities.
(4) The defendant's educational background.
(5) The defendant's employment status and capabilities.
(6) Residence history of the defendant.

(7) Financial status of defendant.
(8) Health of the defendant.
(9) The defendant's sense of values and outlook on life in general.
(10)(e) Information which may be included in the presentence report. (1) Content. The presentence report may include information of a hearsay nature where the presentence investigator believes that the information is reliable, and the court may consider such information. In the trial judge's discretion, the judge may consider material contained in the presentence report which would have been inadmissible under the rules of evidence applicable at a trial. However, while not all information in a presentence report need be in the form of sworn testimony and be admissible in trial, conjecture and speculation should not be included in the presentence report.

(see Appendix 80 for full text).

Idaho Code Section 19-5306(1)(b) & (3) provides, in pertinent part:

(1) Upon request, each victim of a felony offense shall be:
. . .
(b) Consulted by the presentence investigator during preparation of the presentence report and have included in that report a statement of the impact which the defendant's criminal conduct has had upon the victim;...
(3) The provisions of this section shall apply equally to the immediate families of homicide victims or immediate families of victims of such youthful age or incapacity as precludes them from exercising these rights personally.

28 U.S.C. Section 1257(a) provides in pertinent part:

Final judgments or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed by the Supreme Court by Writ of Certiorari...where the validity of a statute of any state is drawn in question on the ground of it being repugnant to the Constitution, Treaties, or the Laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the Treaties or Statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

The Respondent, Jaimi Dean Charboneau, was convicted of the first degree murder of his former wife, Marilyn Arbaugh.

Prior to sentencing and pursuant to I.C. § 19-2515 and § 19-2516 and Idaho Criminal Rule 32, a presentence investigation was conducted and the resulting report was

provided to the Court. At the sentencing hearing, the Trial Judge admitted into evidence a letter from the victim's father. The letter, however, was not part of the presentence report. It set forth the family members' opinions and characterizations of the crime and of the defendant. It also noted the emotional impact of the crime on the victim's daughter, as well as describing the good character of the victim. The letter went on to state:

> [S]he walked past him in the barn and he shot her in the back several times; he could have changed his mind at this point but he didn't. He walked up to her, yelling at her, and shot her several more times in the chest. (Appendix 86)

The Trial Judge found that:

> ...After firing the first volly (sic) of shots the victim,...could have been saved... At that moment the defendant, Jaimi Charboneau had a choice. He could have saved the women he professed to love. However, with at least two minutes to give thought to the matter, the defendant...chose to fire additional shots. (Appendix 37)

The Trial Court found the existence of aggravating circumstances which were not outweighed by the mitigating circumstances presented, therefore, sentenced the defendant to death.

On review of Charboneau's sentence and conviction, the Idaho Supreme Court set aside the death sentence on four separate grounds, the first being that the letter from the victim's father (Arbaugh) constituted hearsay evidence which, pursuant to Idaho statute, should only have been presented through the presentence report.

Secondly, the Idaho Court viewed the "Arbaugh letter" and portions of the presentence investigation report as a Victim Impact Statement. The Court held that the letter and portions of the presentence report, pursuant to Booth v. Maryland, 428 U.S. 496 (1987), should not have been admitted into evidence.

The third reason for vacating Charboneau's death sentence is that the Trial Court had incorrectly weighed aggravating and mitigating circumstances, pursuant to Idaho statute, in reaching its decision to impose the death sentence. I.C. § 19-2515(c) requires that all mitigating circumstances be weighed against each of the statutory aggravating circumstances separately.

The final reason for which the Idaho Court vacated Charboneau's death sentence was no evidence existed in the record to support the Trial Judge's Finding that the victim's life could have been saved after the first volley of shots. Since it was unclear whether the Trial Court would have imposed the death penalty without having reached such a conclusion, the sentence was vacated and remanded.

SUMMARY OF ARGUMENT

I. LACK OF JURISDICTION

Charboneau respectfully submits that The State of Idaho v. Jaimi Dean Charboneau is not an appropriate case for review by the United States Supreme Court. This is true for two reasons, the first being lack of jurisdiction. The United States Constitution has conferred upon the Court the power to determine actual controversy arising between adverse litigants. Traditionally, the Court has therefore refrained from rendering advisory opinions. A decision rendered in this case would be a departure from that tradition for the following reasons:

First, the decision to be reviewed is the Idaho Supreme Court's reversal of the death sentence imposed upon Charboneau and a remand of the case for resentencing. Regardless of the Court's treatment of the issues raised by the State, the Idaho decision will remain unchanged because only

three of the four separate grounds for the remand are before this Court. The Idaho Court found that the actual record did not support a crucial Finding of Fact made by the Trial Judge and therefore remanded the case. This issue has not been raised to this Court, and therefore, the Idaho Court's decision to remand will remain unaltered.

Even without the fourth justification for reversal, the Court lacks jurisdiction because there exists adequate and independent State law grounds for the Idaho Court's remand decision. Of the three issues presented for review, only the first relating to Booth v. Maryland, supra, primarily addresses a question of Federal law. The second issue, relating to the use of hearsay evidence in capital sentencing proceedings, is expressly couched in terms of interpretation of the statutes of the State of Idaho, as is the third issue relating to the process of weighing mitigating circumstances against aggravating circumstances in death penalty cases. Therefore, there exists adequate and independent State grounds for the Idaho decision, and this Court is without jurisdiction.

II. NO CONFLICT ON FEDERAL LAW ISSUES

Charboneau further respectfully urges the Court to deny the requested review because there are no "special" and "important" reasons for granting such review. The Idaho Court's decision is not in conflict with other State Courts, Federal Courts, or the United States Constitution. The Idaho Court's determination that the "Arbaugh letter" is an inadmissible Victim Impact Statement is entirely consistent with this Court's pronouncement in Booth v. Maryland, supra.

Likewise, no conflict exists as to the Idaho ruling that hearsay evidence must be contained in the statutorily recognized presentence report in order to be introduced in a

capital sentencing hearing. The decision merely interprets the Idaho statutory scheme which specifically provides for the use of hearsay evidence in capital sentencing hearings. The Idaho statutes provide that hearsay evidence that has been screened for reliability and which has been included in a presentence investigation report can be considered by the sentencing judge.

Nor does the third issue represent a conflict which would justify a review by this Court. This issue relates to the Idaho Court's interpretation of the Idaho Statute that regulates imposition of the death sentence. The Opinion states that when statutory aggravating circumstances are found, each aggravating circumstance must be weighed against any mitigating circumstances presented. If any one of the aggravating circumstances are found to outweigh the mitigating circumstances, then the death sentence can be imposed. (Appendix 42) The State has cited no authority conflicting with the Idaho decision on this issue or on either of the other two, and therefore, none of the "special" and "important" reasons for review referred to in Supreme Court Rule 17, exist.

ARGUMENT

I. LACK OF JURISDICTION

The Court lacks jurisdiction to review the present case, and Charboneau therefore respectfully urges the Court to refrain from doing do so. Charboneau believes that the Court lacks jurisdiction because any decision rendered by the Court in this case would be merely advisory. Traditionally, the Court has recognized that judicial power conferred by the Constitution is power to determine actual controversies arising between adverse litigants and that the Court should not give opinions in the nature of advice. Muskrat v. United States, 219 U.S. 346 (1911). A test for the existence of an advisory

opinion was stated in Herb v. Pitcairn, 324 U.S. 117 (1945).

> We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the State Court after we corrected its views of Federal Law, our review could amount to nothing more than an advisory opinion.

Id. at 126.

On the issues presented in the State's Petition, there is no actual controversy, there are no adverse litigants, and an opinion rendered by this Court would be merely advisory. This is true because the Idaho Supreme Court vacated Jaimi Dean Charboneau's death sentence and remanded it for resentencing on four separate grounds. The State of Idaho brings before the Court but three of those grounds. As the fourth ground, the Idaho Court vacated Charboneau's death sentence because there was no evidence in the record to support the Trial Judge's Finding that the first volley of shots was not fatal to the victim and that her life could have been saved with medical attention prior to the second volley of shots. (Appendix 37-38)

The unsupported Finding of the Trial Judge necessitated a remand for resentencing because it was unclear from the Findings whether the Trial Court would have imposed the death penalty without having concluded that the first volley of shots was not fatal. This imperfection in the Trial Court's reasoning represented a substantial justification for vacation and remand and was totally independent from any Federal law issues.

This case involves no adversary litigants. It has been remanded for resentencing, and a substantial basis for that decision has not been challenged. The parties before the Court at this time are actually the State of Idaho vs. "a decision of the Idaho Supreme Court" and consequently, this Court's decision will have no effect on the fate of Jaimi Dean Charboneau.

Since this fourth issue is not before the Court for review, the Idaho Court's Order will stand regardless of this Court's decision on Federal issues, thereby rendering said Opinion advisory.

In addition to the fourth ground for reversal being omitted from this proceeding, a decision rendered in this case would be rendered advisory because there are adequate and independent State grounds for the Idaho Court's decision to vacate and remand. The only issue before the Court, which rests squarely on the Idaho Court's determination of the Federal law, is the first issue raised by the State dealing with Booth v. Maryland, supra, and Victim Impact Statements. The other issues raised in this proceeding are issues of construction of State statutes and not of Federal law.

In determining whether the Idaho Court's reference to State law constitutes an adequate and independent State ground for its decision, the Court should not look beyond the Opinion itself. Michigan v. Long, 463 U.S. 1032 (1983). Beginning on Page 31 of the Idaho Court's Opinion (Appendix 31), the Idaho Court addresses the issue of whether hearsay, in the form of a letter from the victim's father should have been admitted into evidence at the sentencing hearing.

In its discussion, the Idaho Court resorts exclusively to an analysis of the Idaho sentencing statutes. The Idaho Court reasoned that I.C. § 19-2516 requires that the circumstances in aggravation or mitigation of punishment must be presented by live testimony, except as provided in § 19-2515. I.C. § 19-2515(d) provides for a presentence investigation in all death penalty cases. The Idaho Court went on to interpret said statute as allowing the State and the defendant to present all relevant evidence in aggravation and mitigation at the sentencing hearing, that would otherwise be admissible.

The Court also interpreted the death penalty statutes in light of Idaho Criminal Rule 32(e)(1) and Idaho Rule of Evidence 101(e)(3). Rule 32(e)(1) allows a presentence report to contain hearsay only where the presentence investigator believes that the information is reliable, Idaho Rule of Evidence 101(e)(3) provides that the Idaho Rules of Evidence do not apply to sentencing hearings. (Appendix 33) The Idaho Opinion shows a concerted effort to construe the Idaho Statutes consistently with one another, while at the same time providing for the admission of reliable hearsay at the sentencing hearing.

There is no citation of Federal law in this section of the Opinion. Given the Idaho Court's overriding concern with construction of Idaho Statutes and Criminal Rules, it is obvious that this part of the decision addresses the manner in which reliable hearsay is to be presented at a capital sentencing hearing. It does not address the Federal law issue of whether hearsay evidence is admissible. Since State Courts are the ultimate expositors of State Law, Mullaney v. Wilbur, 421 U.S. 684 (1975), and since no Federal issue was addressed, the Court lacks jurisdiction to review this claim.

Likewise, the "interpretation of state statutes argument" applies to the Idaho Court's determination that mitigating circumstances must be weighed against each statutory aggravating circumstance individually prior to imposition of the death penalty. Beginning on page 41 of it's Opinion (Appendix 41), the Idaho Court cited State v. Thompson, 101 Idaho 430, 614 P.2d 970 (1980), for the proposition that criminal statutes must be strictly construed. The Idaho Court then went on to interpret the plain meaning of the words contained in the Idaho death penalty statute, I.C. § 19-2515(c). The Court stated:

> I.C. § 19-2515(c) refers to "mitigating circumstances" that are to be weighed

> against "any aggravating circumstance found". If the legislature had intended the mitigating circumstances to be weighed against all the aggravating circumstances found as a group, it would have referred to "the aggravating circumstances found". The plain meaning of the statute dictates our conclusion on this issue. (Appendix 42)

The quotation set out above evidences a "plain statement" that the Court's decision rests upon the adequate and independent state ground of interpretation of the wording of a state statute. Consequently, the Court is without jurisdiction on this issue.

The Petitioner argues that, although the Idaho Opinion relating to the "hearsay issue" and the "weighing of circumstances issue" refers only to Idaho law, the Idaho Court necessarily decided these two issues based on Federal law because the statutory constructions were interwoven with Federal concerns. It is true that in State v. Osborne, 631 P.2d 187 (Idaho 1981), the Idaho Court recognized that the Idaho legislature enacted Idaho's present death penalty statutes in response to the United States Supreme Court's mandate that:

> [t]he sentencing authority must be given specific and detailed guidance to assist them in deciding whether to impose a death penalty in order to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Id. at 191.

However, this recognition of legislative purpose does not transform every interpretation of the legislative enactment into a determination of Federal law. The Idaho Court clearly recognized that the Idaho legislature had attempted to give specific and detailed guidance in death penalty cases, and in the present case, the Idaho Court proceeded to interpret the guidance that had been given. No question of Federal law was addressed.

II. NO CONFLICT ON FEDERAL LAW ISSUES

Even if the Court finds that there is a jurisdictional basis on which to review this case, Charboneau urges the Court to deny the requested review because there are no "special" and "important" reasons for granting said review. More specifically, the Idaho Court's decision is not in conflict with the decisions of other State Courts, Federal Courts, or the United States Constitution.

A. ARBAUGH LETTER AND BOOTH V. MARYLAND

The Idaho Court's decision that the "Arbaugh letter" was an inadmissible "Victim Impact Statement" pursuant to Booth v. Maryland, supra, is consistent with this Court's Opinion in that case. In South Carolina v. Gathers, 109 S.Ct. 2207 (1989), the Court described Booth as follows:

> We address the question whether use of 'victim impact statements' in capital sentencing proceedings violated this principal that a sentence of death must be related to the moral culpability of the defendant. We held that such statements introduced factors that might be 'wholly unrelated to the blameworthiness of a particular defendant'. (citation omitted)
>
> The statements placed before the jury in Booth included descriptions of the victim's personal characteristics, statements concerning the emotional impact of the crime on the victim's family, and the family members' opinions about the crime and the defendant. Id. at 2210.

The hearsay statement addressed in Gathers concerned the personal characteristics of the victim. The Court held that said statement should not have been made part of the sentencing considerations.

In the present case, the lengthy letter written by the victim's father (Appendix 84) sets forth the family members' opinions and characterizations of the crime and the defendant. For that reason, the Idaho Court held that the letter should

not have been considered by the Trial Court in sentencing (Appendix 33-36).

The Idaho Court's reasoning and decision are not in conflict with the Court's pronouncements in either Booth or Gathers; nor are they in conflict with Lockett v. Ohio, 438 U.S. 586 (1978), as inferred in the Petition.

The Lockett case dealt with a state statute which limited the range of mitigating circumstances which could be considered by the sentencing court. The Court held that the sentencer in capital cases must be allowed to give independent mitigating weight to "aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation". Id. at 605. The case did not involve issues of Victim Impact Statements.

Furthermore, the Court's Opinion in Lockett actually tends to support the Idaho Court's decision that the Booth rule, at least in Idaho, will apply, regardless of whether the capital sentencer was a judge or a jury. The Idaho Court held that since the risk of arbitrary and capricious decisions exists, regardless of whether the sentence is rendered by a judge or a jury, the Booth rule would apply to death penalty sentences rendered by Idaho judges. The Court in Lockett also recognized that "this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed". Id. at 604.

The Petitioner attacks the Idaho Court's ruling on the Booth issue on grounds that the Idaho Court impermissibly applied a "reversible error per se" approach to the admission of the Victim Impact Statement. In support of this proposition, Petitioner cites Maynard v. Cartwright, 108 S.Ct. 1853 (1988). In Maynard, a death penalty was overturned by a state appeals court because one of two aggravating circumstances found by the jury had been struck down. The

State argued that since one aggravating circumstance would sustain the sentence, the United States Supreme Court should not allow the sentence to be automatically reversed. The Court held that where State law did not provide for curing the sentencer's consideration of an invalid aggravating circumstance, the United States Supreme Court would not interfere. This Court had no problem with the "reversible error per se" approach in Maynard. Therefore, the Idaho decision does not conflict with Federal law.

The Petitioner goes on to infer that the consideration of the "Arbaugh letter" was harmless error and that the Idaho Supreme Court concluded that the Trial Court's Findings were not based upon said letter. Said inference is simply not true. On this issue, the Idaho Court stated as follows:

> We are not dissuaded from our conclusion on this issue by the statement of the Trial Court in the written sentencing findings that he had "endeavored to avoid anything that might be hearsay, not absolutely pertinent or not totally supported by the evidence" (citation omitted)...Even a well intentioned and conscientious effort by the Trial Court to avoid considering the hearsay contained in the letter does not suffice. (Appendix 33)

In fact, Charboneau submits that the Trial Judge did rely on statements contained in the "Arbaugh letter". Please note the similarity between the statements of the victim's father:

> [S]he walked past him in the barn and he shot her in the back several times; he could have changed his mind at this point but he didn't. He walked up to her, yelling at her, and shot her several more times in the chest. (Appendix 86)

and the unsupported Finding of the Trial Court that:

> ...after firing the first volly (sic) of shots the victim Marilyn Arbaugh was wounded but her life could have been saved...At that moment the defendant, Jaimi Charboneau had a choice. He could have saved the women he professed to love. However...Jaimi Dean Charboneau, chose to fire additional shots into the wounded and helpless body of Marilyn Arbaugh. (Appendix 37)

Evidence that the victim's life could have been saved after the first volley of shots appears in the record in one place only. That place is the letter of the victim's father (Appendix 84 - 88).

The Idaho Court's decision relating to Booth, supra, is consistent with Federal law. Furthermore, the Trial Court's reliance on assertions contained in the "Arbaugh letter" demonstrates the necessity for application of the Booth rule in capital sentencings that are conducted by a judge.

B. HEARSAY EVIDENCE IN CAPITAL SENTENCING

The Idaho Court ruling that hearsay evidence in capital sentencing proceedings is admissible if made part of a presentence report is consistent with Federal law and with the United State's cases cited by Petitioners. The Idaho approach provides for a wide variety of informational sources in order that the sentencer can gain a realistic view of the defendant's character, propensities and culpability. It provides for a presentence investigation, conducted by trained probation officers, I.C. § 2515(d). These officers provide the sentencer with a report of their investigation which can be considered at the sentencing hearing, I.C. § 2516 (Appendix 31-33). Hearsay evidence can be presented at the sentencing hearing through the presentence report. The investigator however, is required to screen said hearsay evidence for reliability prior to including it in his report, I.C.R. 32(e)(1).

In United States v. Grayson, 438 U.S. 41 (1978), the Court recognized the importance and utility in using trained probation officers to conduct presentence investigations and to submit investigative reports to the sentencing judge (Grayson did not address issues of hearsay).

In Williams v. New York, 337 U.S. 241 (1949), the

Court confirmed the appropriateness of the sentencing judge's reliance on evidence presented at trial, and on a wide range of hearsay information contained in the presentence report. The Court held that:

> Under the practice of individualizing punishments, investigational technics have been given an important role. Probation workers making reports of their investigations...have been given a high value by conscientious judges who want to sentence persons on the best available information..the probation report draws on information concerning every aspect of a defendant's life. Id. at 250.

In Williams v. State, 358 U.S. 576 (1959), the defendant objected to the State's attorney making a sworn statement to the Court relating the details of the Petitioner's past criminal record. The defendant objected to the statement as being contrary to an Oklahoma statute which required that information be entered by the testimony of witnesses examined in open court. The Court held that the defendant waived his right to a formal hearing pursuant to the Oklahoma statute because he failed to request it.

Green v. Georgia, 442 U.S. 95 (1979), also cited by the Petitioner, was found not to involve the exclusion of relevant hearsay. This Court held that the excluded testimony was highly relevant to a critical issue of punishment. The evidence was corroborated, and was later used to procure a conviction of a co-defendant. Additionally, the statement was against interest and constituted a confession to a crime, and therefore, the statement was not hearsay under Georgia law. Under these circumstances, the exclusion of the statement constituted a violation of the defendant's right to Due Process.

Godfrey v. Georgia, 446 U.S. 420 (1980), likewise involved no hearsay issues. However, the Court in that case did recognize that if the State authorizes capital punishment, it must tailor and apply its law in a way that channels the

sentencer's discretion and which will make the sentencing process rationally reviewable. This is what the Idaho Legislature and the Idaho Supreme Court has attempted to do.

The propriety of acceptance of hearsay evidence at a sentencing hearing was not addressed by this Court in United States v. Tucker, 404 U.S. 443 (1972), nor was it addressed in Roberts v. United States, 445 U.S. 552 (1980).

The Petitioner has cited absolutely no United States authority which conflicts with the Idaho Court's interpretation of the Idaho death penalty sentencing statutes. Therefore, Charboneau urges the Court to decline review of this matter.

C. WEIGHING OF MITIGATING AND AGGRAVATING CIRCUMSTANCES

Again, Petitioner fails to cite even one decision of this Court which is in conflict with the Idaho Court's interpretation of I.C. § 19-2515(c). It is true that the Idaho legislature enacted the present death penalty statutes in response to relevant Opinions of this Court. However, all states have discretion to structure their system of death sentence imposition in their own way. Cabana v. Bullock, 474 U.S. 376 (1986). The Idaho legislature has complied with the mandate of this Court and has structured a system by which mitigating circumstances must be weighed against each aggravating circumstance individually prior to imposition of the death sentence. I.C. § 19-2515(c), (Appendix 42).

The Idano Court's interpretation and application of the Idaho death sentence statute does not conflict with the ruling of this Court. The fact that the Petitioner speculates that it will be difficult to weigh mitigating circumstances against each aggravating circumstance does not constitute a "special and important" reason for the Court to review this decision.

CONCLUSION

For the above stated reasons, Jaimi Dean Charboneau respectfully requests that the Court deny the State's Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED This 24th day of August, 1989.

By _____

GREG J. FULLER
Fuller Law Offices
P. O. Box 30
Jerome, ID 83338
(208) 324-8193

APPENDIX

1989 Opinion No. 44.

IN THE SUPREME COURT OF THE STATE OF IDAHO

Nos. 16329 and 16741

THE STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent.	)	Boise, November 1988 Term
	)	
v.	)	Filed: April 4, 1989
	)	
JAIMI DEAN CHARBONEAU,	)	Frederick C. Lyon, Clerk
	)	
Defendant-Appellant,	)	

Appeal from the district court of the Fifth Judicial District of the State of Idaho, in and for the County of Jerome. Honorable Phillip M. Becker, District Judge.

Review of death sentence and appeals from conviction of first degree murder and from denials of applications for post-conviction relief. Conviction affirmed; sentence vacated; remanded for resentencing.

Greg J. Fuller, of Jerome, Idaho, attorney for appellant.

Hon. Jim Jones, Attorney General; Lynn E. Thomas, Solicitor General, of Boise, Idaho, attorneys for respondent. Mr. Thomas argued.

JOHNSON, J.

This is a first degree murder case that comes to us for review of a death sentence pursuant to I.C. § 19-2827 and on appeal from

the conviction and from denial of applications for post-conviction relief. We affirm the conviction but vacate the sentence and remand the case to the trial court for resentencing.

I.

THE BACKGROUND AND PRIOR PROCEEDINGS.

Jaimi Dean Charboneau (Jaimi) was convicted of the first degree murder of his former wife, Marilyn Arbaugh (Marilyn). Jaimi was sentenced to death for this crime. The trial court twice denied post-conviction relief.

Jaimi and Marilyn lived together for approximately two years before they were married in June 1983. Marilyn had two teenage daughters, Tiffnie and Tira. The relationship between Jaimi and Marilyn was stormy. There is evidence that Jaimi physically abused Marilyn. In August 1983 Marilyn shot Jaimi with a .22 caliber pistol during a dispute. An aggravated battery charge was filed against Marilyn but was subsequently dismissed on the motion of the prosecuting attorney. In the spring of 1984 Marilyn filed for divorce. A default judgment was granted on June 13, 1984. There is evidence that Jaimi and Marilyn continued to see each other and were sometimes intimate after the divorce.

On June 21, 1984, Jaimi went to the cafe where Marilyn worked. They left in Marilyn's car. There is some dispute whether Marilyn went with Jaimi voluntarily. The next day Marilyn reported to the police that Jaimi had kidnapped and raped her and had stolen her car. There is evidence that Jaimi travelled to Nevada after June 21. The burned remains of Marilyn's car were found in southern Idaho in late June 1984. On June 25, 1984, Jaimi was charged in Jerome County, Idaho with first degree kidnapping of Marilyn and grand theft of her car.

On June 28, 1984, Jaimi purchased a .22 caliber rifle from a hardware store in Gooding, Idaho. About mid-morning on Sunday, July 1, 1984, Marilyn returned to her residence on a ranch near Jerome, after being gone since the evening before. Some time after 11:00 o'clock that morning Marilyn went out to check some horses in a corral near her home. Shortly after that Marilyn's daughter Tiffnie heard shots outside, grabbed Marilyn's .22 pistol, and went

to see what had happened. She found her mother sitting on the ground in the barn with blood on her. Jaimi was standing close to Marilyn with a .22 caliber rifle pointed at Marilyn. Tiffnie asked Jaimi to leave and told him she was going to call the police. Jaimi told Tiffnie that he would take Marilyn to the doctor. Both Marilyn and Jaimi told Tiffnie to leave.

At 11:38 that morning Tiffnie called the Jerome County Sheriff's office and said that Jaimi had shot her mother. Tiffnie then told her sister Tira about the shooting, and they both got dressed. They heard more shots and ran outside where they hid behind a sheep wagon and called to their mother. Tiffnie had her mother's .22 caliber pistol with her, and it accidentally discharged behind her. She ran into the house, hid the gun, returned to the sheep wagon, and then ran to the barn. Tira followed close behind. Marilyn was lying on her back with her arms over her head. The girls ran back to call for an ambulance. At 11:42 a.m. Tira telephoned for assistance and reached the Jerome County Sheriff's office. She told them to get an ambulance and that her mother was dying. When the sheriff's deputies arrived at the scene, they found Marilyn's body in the barn and located Jaimi in a field near the barn with a .22 caliber rifle lying nearby. Jaimi was arrested and charged with first degree murder. At the time of his arrest, Jaimi acknowledged that he had shot Marilyn, although he stated that he did so because she was going to shoot him.

The Jerome County public defender (the public defender) was appointed to represent Jaimi on the murder, kidnapping, and grand theft charges. Prior to a preliminary hearing on these charges, Jaimi's mother employed a private defense attorney (the defense attorney) to represent him. Following the preliminary hearing, Jaimi was bound over for trial on all three charges.

Jaimi told the defense attorney that he had not kidnapped or raped Marilyn and that he had not stolen her car. He stated that he and Marilyn had maintained a close and intimate relationship after their divorce, that she had been with him voluntarily on June 21 and 22, 1984, and that they had had consensual sexual

intercourse on that occasion. He said that he had purchased the .22 caliber rifle as a present for Tira and on June 28, 1984, had taken it with him to the ranch where Marilyn and her daughters lived. He told the defense attorney that he and Marilyn had reconciled and were going to live together again, but that she wanted him to stay in the barn until she broke the news to her daughters. He said that he and Marilyn had sexual relations on the evening of June 30, 1984, and that she then left the ranch and did not return until the next morning.

Initially, Jaimi told the defense attorney that on the morning of July 1, 1984, Marilyn had taken the .22 caliber rifle he had purchased for Tira into the house to remove a scope sight from it. He said that when she returned to the barn she loaded the rifle, pointed it at Jaimi, and pulled the trigger, but that it did not fire. Jaimi told the defense attorney that he grabbed the rifle from Marilyn and pulled the trigger several times while the rifle was on his hip and Marilyn was running away. He said that he closed his eyes while shooting. He said that after the shooting he took the rifle and fled to the nearby field.

Later, but prior to August 22, 1984, Jaimi told the defense attorney that after he fired the shots at Marilyn, instead of running directly out into the field, he had stayed around the end of the barn. He told the defense attorney that he heard Tiffnie talking to her mother and had looked around the corner. He said he saw Tiffnie holding a pistol in both hands pointed at Marilyn. Jaimi said that Tiffnie told Marilyn that Marilyn had screwed up their lives, ruined Tira's life, and was ruining Jaimi. He stated that he saw Tiffnie fire a shot from the pistol and saw Marilyn's hair fly up.

The defense attorney contends that based on this second version of the events of July 1, 1984, he tried to convince the prosecuting attorney to reinvestigate the crime. On August 23, 1984, he also discussed this version in a telephone conversation with his niece who was a psychic. Shortly after August 23, 1984, the defense attorney received a letter from his niece in which she reported having made contact with Marilyn through clairvoyance.

The letter reported Marilyn's version of how she was killed. Among other things, the letter intimated that Marilyn's daughter had shot Marilyn after Jaimi had, because she couldn't stand to see her mother suffer.

The defense attorney was unable to convince the prosecuting attorney to dismiss the kidnapping and grand theft charges and to pursue the "second gun" theory. The defense attorney then filed a motion to dismiss the charges. At a hearing on this motion, the defense attorney called Jaimi to testify. The district judge carefully advised Jaimi that he could not be required to testify and gave the defense attorney an opportunity to explain fully to Jaimi his right to remain silent. Jaimi confirmed to the district judge that he understood that he had the right not to testify and that anything he said might be used as evidence against him. Jaimi was then sworn and testified.

In his testimony in support of the motion to dismiss Jaimi related fully the events concerning the alleged kidnapping and theft on June 21 and 22, 1984, as well as the events of July 1, 1984, surrounding Marilyn's death. He testified that when Marilyn came to the barn that morning she picked up the .22 caliber rifle and took it into the house to remove a scope sight that had come with it. He said that Marilyn told him that she was going to tell the girls that day that Jaimi was there and would let Tira take the gun to the gun range and let her sight it in. Jaimi told the court that when Marilyn came back to the barn she had a handful of bullets and loaded the rifle. He said that after going out to the corrals to move some horses, he and Marilyn returned to the barn. He said he asked Marilyn where she had been all night, and that she told him he thought she was sleeping with every guy in the valley. He stated that Marilyn picked up the rifle, pointed it at him, and told him that he was dead and that no other woman was going to have him. He said he heard a click, grabbed the barrel of the rifle and wrestled it away from her. Jaimi testified that Marilyn screamed for Tiffnie to bring Marilyn's shotgun to her, and that when he got the rifle away from Marilyn, she turned around and ran. He said that he saw Tiffnie coming from the house, that he had the rifle

at his hip, and that he thought Marilyn might be going to run around and get another gun. He said that he closed his eyes and that the gun went off several times. He opened his eyes and Marilyn was on her knees and bleeding. He said that Marilyn told Tiffnie to leave and that he told Tiffnie to call an ambulance. He testified that as he knelt beside Marilyn, Tiffnie came running toward them with a pistol saying, "I hate both of you guys." He said that Tiffnie fired the pistol two or three times and that he ran out of the barn. He stated that when he realized that Tiffnie was not coming after him he eased back to the barn and heard Tiffnie talking to her mother. He testified that he saw Tiffnie standing above her mother, heard the pistol go off, and saw Marilyn's hair fly up.

After the district judge denied the motion to dismiss, the defense attorney wrote a letter to the deputy attorney general who had been appointed as a special prosecutor in the case. In this letter the defense attorney set forth Jaimi's version of the events involved in the charges against him. He also sought to have the special prosecutor arrange for Jaimi to be given a polygraph examination and to make his own investigation of the charges. Subsequently, the defense attorney revealed to the special prosecutor all the evidence and information he had regarding the case and arranged for Jaimi to be interrogated by an investigator from the attorney general's office, without the defense attorney being present. This interrogation took place and lasted over two hours. Jaimi divulged a great many more particulars concerning the alleged kidnapping, theft and murder.

On the motion of defense counsel venue was changed to Ada County and the three charges were consolidated for trial. The trial was scheduled to begin in Boise on April 15, 1985. On March 13, 1985, Jaimi indicated that he did not want the defense attorney to continue to represent him. The trial court allowed the defense attorney to withdraw and reappointed the public defender. Jaimi contended that the defense attorney had delegated too much of the investigation in the case to an investigator whom he described as "living in some kind of a fantasy world." Jaimi confirmed that it

had been his desire to testify at the hearing on the motion to dismiss, that the decision to do so was a joint decision between him and the defense attorney, and that he agreed that was the best thing to do. Jaimi said he understood that if a new attorney was appointed to represent him, the trial would begin on April 15, 1984. He told the trial court that he wanted the trial to begin on that day. The trial court agreed that the defense attorney would be allowed to sit at counsel table with the public defender during the trial.

The trial began as scheduled on April 15, 1985. Before any evidence was received, the public defender moved to preclude the prosecution from using in any fashion Jaimi's statements during his testimony at the hearing on the motion to dismiss and during his interrogation by the investigator from the attorney general's office. The trial court denied the motion.

At the conclusion of the prosecution's case, the public defender moved to dismiss the kidnapping and theft charges on the ground that the court lacked jurisdiction, since there was no proof that the crimes occurred in Jerome County. The trial court agreed and dismissed the charges. The public defender then moved to strike all of the evidence that had been admitted relating to the kidnapping and theft cases. The court denied the motion on the ground that the evidence would have been admissible in the murder case in any event. The trial court informed the jury that the charges had been dismissed. The trial then proceeded on the murder charge.

Jaimi did not testify at the trial. The public defender chose not to call him. The public defender felt that Jaimi's testimony would be "nit picked" by the prosecution, because of the availability of Jaimi's version of the events surrounding Marilyn's death provided by Jaimi's testimony at the hearing on the motion to dismiss, by the defense attorney's letter to the special prosecutor, and by Jaimi's interrogation by the investigator for the attorney general. The defense presented on Jaimi's behalf was designed to convince the jury that Jaimi shot Marilyn but did not kill her, or, that if he did kill her, he did not intend to. The

defense argued that the killing did not amount to first degree murder.

Among the instructions given to the jury by the trial court was one concerning lesser included offenses. This instruction included a provision that the jury "should consider the included offenses only in the event the state has failed to convince you beyond a reasonable doubt of the guilt of the accused with respect to the crime charged."

Following the jury's verdict that Jaimi was guilty of first degree murder, a presentence report was prepared and the trial court conducted sentencing hearings. At the time of these hearings, Jaimi was represented by another private defense attorney (the second defense attorney). At one of these sentencing hearings a letter written to the trial judge by Marilyn's father was admitted in conjunction with the father's testimony. This letter described the relationship between Jaimi and Marilyn, including Jaimi's physical abuse of Marilyn and the circumstances surrounding Marilyn's shooting Jaimi in August 1983. The letter also discussed Jaimi's violent nature, his harassment of the Arbaugh family after Marilyn's death, the lack of any likelihood that Jaimi could be rehabilitated, and hearsay statements that were adverse to Jaimi. The letter had not been submitted with the presentence report, but the presentence report contained some of the same information in the form of statements from Marilyn's parents. Mr. Arbaugh adopted the letter as part of his testimony at the sentencing hearing. The trial court admitted the letter and added, "taking into consideration that probably great portions of it may be hearsay and stimulated by some prejudice and sympathy, and I will take that into consideration when reviewing it." The prosecutor asked Mr. Arbaugh the following question: "Mr. Arbaugh, is there anything else you would like to say to the Court as to what you think ought to happen to Mr. Charboneau in view of the damage caused to your family by his actions?" In response, Arbaugh stated:

> Well, I think anyone that's been around him that, the last two years that he was loose, knows if he was ever on the street again that the Arbaugh family would be going through the same thing again.

> He's vowed to destroy the Arbaugh family, and you see what he done to start with. There's no doubt in my mind that he wouldn't try to kill the rest of us.

He gave his opinion that Jaimi should be put to death or given a fixed life sentence. The second defense attorney was given an opportunity to cross-examine Mr. Arbaugh.

Following the sentencing hearings, the trial court made findings concerning aggravation and mitigation and sentenced Jaimi to death. Among the facts found by the trial court was that at the time Tiffnie went to the barn after she heard the first shots fired on July 1, 1984, Marilyn's life "probably could have been saved if she had received the necessary medical attention." The trial court also found that within not less than two minutes after leaving the barn Tiffnie heard more shots. The trial court concluded:

> That after firing the first volly (sic) of shots the victim Marilyn Arbaugh was wounded but her life could have been saved if she had received necessary medical attention. At that moment the defendant, Jaimi Charboneau had a choice. He could have saved the woman he professed to love. However, with at least two minutes to give thought to the matter, the defendant, Jaimi Dean Charboneau, chose to fire additional shots into the wounded and helpless body of Marilyn Arbaugh. It appears from the facts that Jaimi Dean Charboneau acted intentionally, methodically and violently while he erased from the face of this earth the life of a human being.

The trial court found "beyond a reasonable doubt that the facts establish the statutory aggravating circumstances set forth in Idaho Code Section 19-2515 (g)(5) and 19-2515 (g)(6)." The trial court was "unable to find any mitigating circumstances which would overcome or outweigh the aggravating circumstances."

The second defense attorney filed an application for post conviction relief, including claims of ineffective assistance of counsel. Following a hearing on this application, the trial court denied the post conviction relief.

Following the appointment of the second defense attorney to become a district judge, he was allowed to withdraw as Jaimi's attorney. The trial court then appointed another attorney (the second public defender) to represent Jaimi. The second public defender filed another application for post-conviction relief alleging, among other things, newly discovered evidence relating to ineffective assistance of counsel. The hearing on this application dealt with a claim that the defense attorney had relied on "supernatural, clairvoyant phenomena to dictate his strategy in defending Jaimi." The trial court found that the letter the defense attorney had received from his niece shortly after August 23, 1984, did not influence the manner in which the defense attorney defended the case. The trial court denied post-conviction relief.

This Court has before it the mandatory review of Jaimi's death sentence, together with appeals from his conviction and from the denials of post-conviction relief. There are a plethora of issues involved in this case. We will address each of them in turn.

II.

DID CHARBONEAU RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL?

A. The standards.

1. Federal.

This Court has recently restated the test for determining whether a defendant has been denied effective assistance of counsel under the Constitution of the United States: "First, a claimant must prove that counsel's performance was deficient. Second, a claimant must show that this deficient performance prejudiced his or her case. [Citing Strickland v. Washington, 466 U.S. 668, 680, 104 S.Ct. 2052, 2064, 80 L.Ed. 674, 686 (1984)]" Aragon v. State, 114 Idaho 758, ___, 760 P.2d 1174, 1176 (1988).

In Aragon this Court also pointed out that "there is a strong presumption that counsel's performance falls within the 'wide range of professional assistance,'" and that "the defendant bears the

burden of proof to show that 'counsel's representation fell below an objective standard of reasonableness.'" Id. at ___. Unless prejudice is presumed, "the defendant must affirmatively prove prejudice." Id. at ____. Prejudice is presumed only in cases such as "where the defendant is denied counsel altogether, or where counsel represents conflicting interests." Id. at ___.

2. State.

In Aragon this Court cited Gibson v. State, 110 Idaho 631, 635, 718 P. 2d 283, 287 (1986) for the proposition that "'the Idaho Constitution potentially can be read to afford a broader right to effective counsel than does the federal Constitution.'" The Court then opined:

> To date that has not taken place. However, as noted in Gibson, we have not yet been required to define the differences between the rights afforded by federal and state constitutions. [Citation omitted.] Nor are we required to do so here. Our review of the record persuades us that the district court did not err in concluding that Aragon failed to establish that counsel's conduct contributed to the conviction.

114 Idaho at ___, 760 P..2d at 1177.

From Aragon we are bound to conclude that it remains the burden of one claiming ineffective assistance of counsel under the Idaho Constitution to prove that "counsel's conduct contributed to the conviction."

The starting point in evaluating counsel's conduct under the state constitution remains the American Bar Association's standards entitled "The Defense Function." (The ABA standards). Aragon, 114 Idaho at ___, 760 P.2d at 1177.

B. The issues.

1. Jaimi's testimony at the motion to dismiss hearing.

Reviewing Jaimi's testimony at the hearing on the motion to dismiss does not convince us that this testimony proves that he was denied effective assistance of counsel. While any of us in hindsight might conclude that Jaimi should not have testified at

the hearing and given the prosecution five months to investigate the story he told, looking at the case as a whole, we cannot say that Jaimi has proved that the reliability of the result at trial would have been different if he had not testified at the hearing.

At the hearing Jaimi testified that Tiffnie had shot Marilyn with Marilyn's pistol after Jaimi had left the barn. Jaimi has continued to assert this version even after his conviction and even after his sentencing. Presumably this is the version that he would have told, if he had testified at trial. It was Jaimi's choice whether to testify at trial. The public defender advised him not to, and Jaimi accepted this advice. We can only speculate whether his testimony would have been impeached and whether the jury would have believed his testimony. It is Jaimi's burden to prove that the reliability of the result has been affected because he testified at the hearing on the motion to dismiss. We are not convinced that the reliability of the result was affected.

The premise of the claim of ineffective assistance of counsel with regard to Jaimi's pretrial testimony is that the defense attorney placed Jaimi on the stand without any legitimate reason or purpose. While it may not have been the game plan that other attorneys would have followed, we may not second guess counsel's strategic and tactical choices. Aragon, 114 Idaho at ___, 760 P.2d at 1177. The defense attorney testified in conjunction with the post-conviction relief proceedings that he knew the murder case was going to trial. He said that his objective in having Jaimi testify at the hearing on the motion to dismiss was to "embarrass the prosecutor into looking to the true facts" of the kidnapping and grand theft cases. The defense attorney disavowed any anticipation that the murder charge would be dismissed. Despite this stated lack of anticipation during the hearing on the motion to dismiss, the defense attorney questioned Jaimi in detail about the events leading to Marilyn's death on July 1, 1984. He also argued to the district judge that the murder charge should be dismissed on the ground that there was not sufficient evidence submitted at the preliminary hearing to support a finding of probable cause. While this inconsistency is troubling to us, we

are unable to conclude that the defense attorney failed to render effective assistance of counsel to Jaimi concerning the pretrial testimony.

When confronted with the defense of serious felony charges such as those in this case, defense counsel may have to rely on creative and sometimes risky tactics to secure the best possible result for a defendant. We are not prepared to say that the decision to have a defendant testify in a pretrial proceeding is sufficient to indicate ineffective assistance of counsel. We find nothing in the American Bar Association's standards relating to "The Defense Function" that would indicate a deficiency of the defense attorney in calling Jaimi as a witness at the hearing on the motion to dismiss.

Three experienced and respected criminal defense attorneys testified at the first post-conviction proceeding that it was not competent representation for the defense attorney to have called Jaimi as a witness at the hearing on the motion to dismiss. These attorneys also testified that other actions of the defense attorney constituted incompetent representation. While we are respectful of the opinions of these attorneys, it is for us to determine in each case whether the constitutional mandate of effective assistance of counsel has been fulfilled. The question is one of law and not one of fact.

2. Divulging information and evidence to special prosecutor.

The letter of the defense attorney to the special prosecutor that was written after the hearing on the motion to dismiss, together with the conversation of the defense attorney with the special prosecutor, divulged all of the information and evidence that the defense attorney and his investigator had developed about the case. While other attorneys might not have pursued this course, we are not persuaded that this constituted a violation of Jaimi's right to effective assistance of counsel.

The defense attorney's stated purpose in divulging the information and evidence was to convince the special prosecutor to conduct an independent investigation. The defense attorney believed that if the special prosecutor and his investigators would

pursue this investigation they would conclude that Jaimi was telling the truth and the cases would be resolved favorably. This may seem like a naive plan to those looking back now, but it is apparent that at the time, the defense attorney was convinced that this was the best course of action. He testified later that he wanted a polygraph examination of Jaimi and hoped that the special prosecutor would be persuaded by the investigation to give Jaimi the examination at state expense. He stated that resources were not available to him to have the examination otherwise. He stated that he did not believe that the district judge would have granted Jaimi the right to have a polygraph examination at county expense.

Even though divulging this information and evidence by the defense attorney did not produce the result the defense attorney wanted, we are not persuaded that it was ineffective assistance for the defense attorney to have tried this tactic. There is no portion of the ABA standards that prohibits disclosures such as these by a defense attorney. It is true that Standard 4-3.1 requires that "the lawyer should explain the obligation of confidentiality which makes privileged the accused's disclosures relating to the case." Here, Jaimi had already testified to his actions in relationship to the charges. The defense attorney divulged nothing new about Jaimi's version. The other information and evidence divulged by the defense attorney was the result of investigation by the defense attorney and his investigator, not what Jaimi had told them.

3. Jaimi's interrogation by the investigator.

The interrogation of Jaimi by the investigator from the attorney general's office was merely an extension of the plan that the defense attorney had initiated by divulging the information and evidence that were contained in his letter to the special prosecutor and his conversation with the special prosecutor and his investigators. We are not persuaded that allowing Jaimi to be interrogated by the investigator without counsel being present constituted ineffective assistance of counsel.

The defense attorney testified in the first post-conviction proceeding that he discussed the interrogation with Jaimi before

it occurred, that he explained Jaimi's right to remain silent, and that Jaimi agreed that he should submit to the interrogation.

4. Failure to apply for funds to assist in the defense and failure to employ experts.

The defense attorney did not apply to the trial court for funds to investigate or to employ experts. No facts are asserted that would have been discovered by additional investigation. No expert testimony is offered that could have been produced if funds had been sought from the trial court. In the absence of this proof, we find no evidence of ineffective assistance of counsel on these grounds.

5. Inadequate investigation.

The defense attorney employed an investigator whom the defense attorney later described as a "flake." Jaimi now complains that the defense attorney did not investigate the charges thoroughly enough. Standard 4-4.1 of the ABA standards sets out the defense attorney's duty to investigate the circumstances of Jaimi's case. Jaimi has not presented any evidence in order to substantiate that an inadequate investigation affected the outcome of the case.

6. Inadequate preparation for trial and failure to request continuance.

The public defender was appointed to replace the defense attorney approximately three weeks prior to trial. The public defender testified at the first post-conviction proceeding that he found that the case was not prepared for trial. He stated that he should have requested that the trial court vacate the trial to allow him to investigate the case further and to prepare for trial. No evidence has been offered as to what new facts or defenses could have been developed if the trial had been continued and further preparation conducted.

7. Consolidation of cases.

The defense attorney sought and obtained the consolidation of the trials on the three charges on the premise that it would be to Jaimi's advantage to have all the facts concerning the events from June 21 through July 1, 1984, presented

to the jury. Although many defense attorneys might not agree with this approach, we are not prepared to say that this choice amounted to ineffective assistance of counsel.

In his testimony at the first post-conviction proceeding the defense attorney described his reason for seeking the consolidation:

> Well, ... they were all so interrelated that the only way that we could show that it was really the intent of Marilyn to murder Jaimi, rather than the other way around, that and from what Jaimi had told us that he had wrestled the gun, that she pointed the rifle at him and pulled the trigger, but it didn't go off, and that he took the gun away from her, and then is when she went dancing down the hall and when he shot her, and none that of (sic) would have had any meaning to the jury at all unless they had the whole scenario which would include the phoney (sic) rape allegation and the phony kidnap allegation.

He also testified that he discussed the motion with Jaimi before it was made.

Standard 4-5.2 of the ABA standards provides that the only decisions that must be made by the accused after full consultation with counsel are what plea to enter, whether to waive jury trial, and whether to testify. This standard states:

> (b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client.

There was no obligation for the defense attorney to leave the decision on whether to request consolidation to Jaimi. We will not second guess the decision.

8. Reliance on clairvoyance.

In the decision on the second application for post-conviction relief the trial court found that none of the evidence directly established that the letter the defense attorney received

from his niece about her clairvoyant contact with Marilyn had any influence on the manner in which the defense attorney defended the case. Our review of the record confirms this finding. Jaimi claims that the defense attorney relied upon his niece's clairvoyant contact with Marilyn and, therefore, did not investigate any alternative defenses. Standard 4-4.1 of the ABA standards sets out the defense attorney's duty to investigate the circumstances of Jaimi's case. We conclude that this standard was not violated. The discussion of the defense attorney with his niece concerning Tiffnie's participation in the death of her mother occurred after Jaimi had related his new version of the facts to the defense attorney. There is no evidence to support the supposition that Jaimi's new version implicating Tiffnie was provoked by the clairvoyance of the defense attorney's niece or the defense attorney's belief in it. In the absence of such evidence we are not prepared to use reliance on clairvoyance as a basis for ineffective assistance of counsel.

9. Failure to have psychological or psychiatric examination.

Jaimi asserts that the public defender or the defense attorney should have advised him about being examined by a psychiatrist or a psychologist before trial. No evidence is offered that would establish any defense for Jaimi through such expert testimony. The psychologist who examined Jaimi after his conviction and who testified in conjunction with the sentencing did not offer any opinion that would excuse the killing. His testimony indicated only that there was some possibility that Jaimi could be rehabilitated. We are unable to conclude that the failure to have Jaimi examined before the trial constituted ineffective assistance of counsel.

10. Excessive use of alcohol.

Jaimi contends that the defense attorney came to his cell on many occasions when the defense attorney was under the influence of alcohol. Even if we assume these allegations are true, no evidence is offered to show in what way this affected the defense attorney's representation of Jaimi.

11. Failure to object to evidence and to request mistrial.

The prosecutor referred in his opening statement to two "hot" checks that Jaimi had reportedly written in Battle Mountain, Nevada. When the checks were offered, the public defender objected, and the checks were not admitted. Jaimi argues that the failure of the public defender to object to the statement of the prosecutor and to move for a mistrial constituted ineffective assistance of counsel. We cannot agree. No connection is made between the checks and the murder. We must assume that the jury followed the instructions of the trial court and made its judgment in the case based on the evidence presented and not on statements of counsel concerning evidence that was not connected with the homicide.

12. Failure to request a new trial.

Jaimi asserts that the public defender should have moved for a new trial. No basis for such a motion is suggested. We find no basis for supporting an ineffective assistance of counsel claim on this ground.

AS TO PART II: SHEPARD, C.J., BAKES and HUNTLEY, JJ., concur. BISTLINE, J., dissents.

III.

WAS THE LESSER INCLUDED OFFENSE INSTRUCTION ERRONEOUS?

Jaimi asserts that the trial court erred in giving the jury Instruction No. 15, concerning lesser included offenses. This instruction stated:

> The law permits the jury to find the defendant guilty of any lesser offense which is necessarily included in the crime charged in the Information, whenever such a course is consistent with the facts found by the jury from the evidence in the case, and with the law as given in the instructions of the Court.
>
> When you are deliberating with respect to each count, you should first consider the crime charged. You should consider the included offenses only in the event the State has failed to convince you

> beyond a reasonable doubt of the guilt of the accused with respect to the crime charged.
>
> The jury will bear in mind that the burden is always upon the Prosecution to prove beyond a reasonable doubt every essential element of any lesser offense which is necessarily included in any crime charged in the Information; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Jaimi argues that the second sentence of the second paragraph of this instruction required the jury to agree unanimously to acquit Jaimi of first degree murder before they could consider any lesser included offenses. In support of this position Jaimi presents the instruction given by the trial court which states: "The verdict reached in this case must be unanimous, that is, you must agree unanimously as to whether the defendant is guilty or not guilty as regards any offense." State v. Korbel, 231 Kan. 657, 647 P.2d 1301 (1982) is cited as a basis for Jaimi's position on the error asserted. We find no error in the instruction given on lesser included offenses.

The major premise of the argument that Instruction No. 15 was erroneous is that the words "failed to convince you beyond a reasonable doubt" would be interpreted by the jury to mean "if you unanimously agree." The fallacy in this major premise is that the words "failed to convince you beyond a reasonable doubt" could reasonably only be interpreted by the jury to mean "if you cannot agree." These are precisely the words that the Kansas Supreme Court found to cure any problem with the instruction that was at issue in Korbel.

Instruction No. 15 allowed the jury to consider lesser included offenses if they could not agree that Jaimi was guilty of first degree murder. That was a correct statement of the law. We note that in State v. Gilman, 105 Idaho 891, 673 P.2d 1085, (Ct. App. 1983) rev. den. (1984) our Court of Appeals considered an instruction relating to lesser included offenses. The comparable language in the instruction at issue there was: "If you are not satisfied beyond a reasonable doubt that the defendant is guilty

of [the offense charged], you may still find him guilty of any such lesser offense ...." Id. at 897, 673 P.2d at 1091. While the point at issue in Gilman was not the same as presented here, our Court of Appeals did not question the propriety of this portion of the instruction. We denied review of the case. We are reinforced in our conclusion here by the implicit approval of this similar language in the instruction in Gilman.

AS TO PART III: SHEPARD, C.J., BAKES, BISTLINE and HUNTLEY, JJ., concur.

IV.

FAILURE TO SUPPRESS USE OF JAIMI'S TESTIMONY AT THE HEARING ON THE MOTION TO DISMISS AND HIS STATEMENTS IN THE INTERVIEW WITH THE INVESTIGATOR FOR THE ATTORNEY GENERAL.

Jaimi asserts that the trial court erred when it refused to suppress the use of the testimony he gave at the hearing on the motion to dismiss and the statements he made in his interview with the investigator for the attorney general's office. The motion to suppress was presented to the court before the receipt of any evidence in the trial of this case. In denying the motion the trial court stated:

> Well, my ruling will be as follows, and for the record I want to make it clear why I am ruling the way I am. As I related to you last evening at the conclusion of your motion, at the time we had the motion to dismiss hearing and at which time Mr. Charboneau did testify, I was very careful, I feel, in admonishing the defendant and advising him of his right to remain silent, that he did not have to testify, that if he did testify that anything he may say, that he would say, may later be used against him. We went into a second day on that hearing, and again on the second day I admonished him. I don't know what else you can do. I think he has the right if he so desires to waive his right to remain silent. He has the right to take the witness stand. He has the right to give testimony. In this motion he wants me to suppress it because he waived his right to remain silent and made a statement.

> And it's interesting for the record to note that Mr. Charboneau through counsel filed a lawsuit in Jerome County in a habeas corpus action alleging that we were violating his First Amendment right to freedom of speech. And a similar action involving Mr. Charboneau against the Sheriff of Jerome County is pending in Federal Court again alleging that he's violated Mr. Charboneau's right to freedom of speech, his First Amendment right. So it's a little inconsistent when on one hand you're complaining that his rights to remain silent were violated because he waived that right and took the stand, and then on the other hand he's complaining because we are violating his rights to freedom of speech. Inconsistent.
>
> That's a lengthy way to get to my ruling, but I want it as a matter of this record so that in review of this matter the higher court will know why I am ruling the way I am. The motion is denied. The State has the right to use the testimony from that hearing on the motion to dismiss, and the State has the right to use the interview between the defendant and Mr. Carr in all respects.

The record of the hearing on the motion to dismiss indicates that Jaimi was given ample advice both by the district judge and by the defense attorney of his right to remain silent. The interview between Jaimi and the investigator for the attorney general's office took place at the request of the defense attorney. Jaimi consented to talk with the investigator, was advised of his constitutional rights before the interview, and waived those constitutional rights.

To the extent that the State relied at the trial on any of Jaimi's testimony at the hearing on the motion to dismiss or his statements to the investigator for the attorney general's office there was no violation of Jaimi's rights. In fact, the record indicates that at trial the State did not attempt to rely on Jaimi's testimony at the hearing and used only a very minor portion of his statements to the investigator.

AS TO PART IV: SHEPARD, C.J., BAKES, BISTLINE and HUNTLEY, JJ., concur.

V.

WAS PREJUDICIAL EVIDENCE ADMITTED ENTITLING JAIMI TO A NEW TRIAL?

Jaimi asserts that the trial court admitted inadmissible prejudicial evidence entitling Jaimi to a new trial. While it is not entirely clear from the brief filed on Jaimi's behalf, the following are apparently the items of evidence that are referred to in this issue:

Pictures of Marilyn's two children.

Pictures of Marilyn's vehicle showing the vehicle identification numbers had been either totally or partially removed.

Testimony of Marilyn's boyfriend as to statements Marilyn made on June 30, 1984, regarding Jaimi.

The record indicates that the only motion for new trial filed on behalf of Jaimi related to newly discovered evidence. In the absence of a motion for new trial on the basis of the allegedly inadmissible prejudicial evidence, there is no proper basis to bring this issue before this Court. In any event, we see no error in the trial court's admission of the evidence questioned in this issue. The only portion of this evidence that raises any question of impropriety is the testimony of Marilyn's boyfriend who was out with her the night before her death. The defense offered evidence of the relationship of Marilyn and Jaimi up to the time of her death. In rebuttal the State offered the testimony of the boyfriend as to statements made to him by Marilyn the night before her death about her relationship with Jaimi. The boyfriend's testimony indicated that Marilyn told him she was worried because she did not know where Jaimi was. That testimony was admissible under I.R.E. 803, as evidence of her existing state of mind.

AS TO PART V: SHEPARD, C.J., BAKES, BISTLINE and HUNTLEY, JJ., concur.

VI.

FAILURE TO STRIKE EVIDENCE OF GRAND THEFT AND KIDNAPPING AFTER DISMISSAL OF THOSE CHARGES.

Jaimi asserts that the trial court erred by failing to strike from the record all evidence pertaining to the grand theft and kidnapping charges after those charges had been dismissed for lack of jurisdiction. At the time the trial court denied the motion to strike this evidence, the district judge stated that the evidence pertaining to the grand theft and kidnapping would have been admissible, even if those charges had not been filed and consolidated with the first degree murder charge. The district judge stated: "This thing occurred over a period of some ten or twelve days and I think the jury needs the benefit of all of that testimony in order to properly arrive at a decision, whichever way they decide." We agree.

I.R.E. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In State v. Needs, 99 Idaho 883, 892-93, 591 P.2d 130, 139-40 (1979) this Court approved the admission of evidence that two weeks prior to the homicide the defendant assaulted the victim with a butcher knife on the grounds that the evidence of this assault tended to show the defendant's motive or intent. We believe the same is true of the evidence of the kidnapping and grand theft here. The circumstances of these acts indicated the hostility of Jaimi toward Marilyn.

AS TO PART VI: SHEPARD, C.J., BAKES and HUNTLEY, JJ., concur. BISTLINE, J., dissents.

VII.

WAS THE EVIDENCE SUFFICIENT TO SUPPORT THE VERDICT?

Jaimi asserts that there was not sufficient evidence to support the verdict of the jury. We disagree.

As this Court has pointed out in another recent first degree murder case where this same issue was presented:

> In analyzing appellant's contention, the appropriate standard of review is whether there is substantial competent evidence to support the jury's verdict. [citations omitted] Our function on appeal is to examine the supporting evidence, not to place ourselves in the jury's position or reweigh the significance of evidence as it relates to specific elements. [Citations omitted.] On appeal, all facts, and inferences to be drawn from those facts, are construed in favor of upholding the lower court decision.

State v. Aragon, 107 Idaho 358, 366, 690 P.2d 293, 301 (1984).

The evidence in this case, together with the inferences that the jury could have drawn from that evidence, provide a sufficient basis for the verdict of the jury. Jaimi had previously perpetrated several acts of violence toward Marilyn. He had also made threats to kill her. He purchased the rifle a few days before Marilyn's death. Shortly before Marilyn's death Tiffnie heard shots. When she went to the barn to investigate, Tiffnie observed Jaimi holding a rifle pointed at Marilyn as Marilyn sat wounded on the ground. A short time later, Tiffnie and Tira heard more shots and found their mother apparently dead. Jaimi was found by the investigating officers in a nearby field with the rifle lying nearby. At the time of his apprehension Jaimi acknowledged to the arresting officers that he had shot Marilyn. These facts and the inferences were sufficient for the jury to find that Jaimi unlawfully killed Marilyn with malice aforethought, wilfulness, deliberation, and premeditation. State v. Warden, 100 Idaho 21, 592 P.2d 836 (1979).

AS TO PART VII: SHEPARD, C.J., BAKES and HUNTLEY, JJ., concur.

BISTLINE, J., expresses no opinion.

VIII.

POST-CONVICTION HEARINGS.

A. The first hearing.

Jaimi asserts that the findings of fact and conclusions of law of the trial court after the first post-conviction hearing were erroneous. This hearing dealt with the alleged ineffective assistance of counsel. We have reviewed the findings of fact in light of the evidence submitted at the hearing and find that these findings were supported by substantial competent evidence. The conclusions of law announced by the trial court are consistent with our conclusions here as to the ineffective assistance of counsel based on the facts submitted at the hearing. We find no error in them.

B. The second hearing.

1. Failure to consider evidence.

At the second post-conviction hearing the trial court limited the evidence to matters that were not presented on the original application for post-conviction relief. At the hearing the primary issue that was addressed was the purported reliance of the defense attorney on clairvoyance in preparing Jaimi's defense. The public defender also testified regarding his state of preparation before trial and how the errors of the defense attorney prejudiced his ability to defend Jaimi. Jaimi asserts that the trial court failed to consider the testimony of the public defender at this hearing.

The transcript of the second post-conviction hearing reveals that the trial court allowed testimony of the public defender relating to matters that were considered at the first hearing "for foundation purposes in order to make more clear [the] testimony in this matter." The trial court stated definitely that it was not going back and adjudicating any of those issues that it had already ruled on in the original application. The second defense attorney stated to the trial court that he did not intend to relitigate

those issues, "but rather to show how those issues affected the trial stage of this case." The trial court then commented:

> For guidance, counsel, I will agree with you, that if you are going to proceed on this amended application for post-conviction relief, alleging that the defendant's Sixth Amendment rights were violated, you do have to show not only that they were violated but how they affected the trial of this case, so I would allow you to show that and, likewise, go back into it. ... But I'm not going to relitigate any of those other issues.

In the findings of fact and conclusions of law rendered by the trial court after the second post-conviction hearing, the trial court stated that the only new issue raised concerned a claim that the defense attorney relied "on supernatural, clairvoyant phenomena to dictate his strategy in defending Jaimi Charboneau and, therefore, allegedly rendered ineffective the assistance of counsel provided by [the defense attorney]."

We conclude from this record that the trial court did not intend to consider the testimony of the public defender that went beyond this new issue, except by way of background. We agree that this was proper. Essentially, Jaimi contends that the trial court failed to consider the effect that the defense attorney's reliance on clairvoyance had on the public defender's ability to render effective assistance to Jaimi in the trial. The fallacy in this position is that in its findings and conclusions after the second post-conviction hearing the trial court concluded that clairvoyance played no part in the strategy for Jaimi's defense developed by the defense attorney. Therefore, we conclude that there was no basis for the trial court to rule that this strategy affected the public defender's defense of Jaimi.

2. Were the findings and conclusions erroneous?

Jaimi asserts that the findings of fact and conclusions of law rendered by the trial court after the second post-conviction hearing were erroneous. We have reviewed those findings and conclusions. The findings of fact are supported by substantial competent evidence. The conclusions of law are in concurrence with

our own conclusions contained in this opinion concerning the relationship of clairvoyance to the effective assistance of counsel.

AS TO PART VIII: SHEPARD, C.J., BAKES and HUNTLEY, JJ., concur.

BISTLINE, J., expresses no opinion.

IX.

SENTENCING.

A. Participation of jury.

Jaimi asserts that the imposition of the death penalty with no participation by the jury in the sentencing process violates the sixth, eighth, and fourteenth amendments to the Constitution of the United States. He also contends that the sentence was unconstitutional because he was denied a jury determination of the aggravating circumstances enumerated in I.C. § 19-2515(g).

In 1983 this Court held "that there is no federal constitutional requirement of jury participation in the sentencing process and that the decision to have jury participation in the sentencing process, as contrasted with judicial discretion sentencing, is within the policy determination of the individual states." State v. Creech, 105 Idaho 362, 373, 670 P.2d 463, 474 (1983) cert. den. 465 U.S. 1051, 104 S.Ct. 1327, 79 L.Ed.2d 722 (1984). See also State v. Sivak, 105 Idaho 900, 902, 674 P.2d 396, 398 (1983) cert. den. 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed.2d 887, (1984); State v. Fetterly, 109 Idaho 766, 710 P.2d 1202 (1985) cert. den., 479 U.S. 870, 107 S.Ct. 239, 93 L.Ed.2d 164 (1986); State v. Fain, Slip Op. No. ___ (released today). In 1984 the United States Supreme Court upheld death sentencing by trial judges. Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

This Court has also held "that Art. 1, § 7, of the Idaho Constitution does not require the participation of a jury in the sentencing process in a capital case." Sivak, 105 Idaho at 904, 674 P.2d at 400. See also Fain, Slip Op. No. ___ (released today).

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Jaimi contends that [illegible] A.R.S. § 13-2515(g) "links an enhanced punishment [illegible] specific enumerated factual findings," it usurps the jury's fundamental role in deciding whether the [illegible] Richmond v. Arizona, 434 U.S. 1323, 98 S.Ct. 8, 54 L.Ed.2d 34 (1977) [illegible] 434 U.S. 813, 98 S.Ct. 49, 54 L.Ed.2d 69 (1977). Justice [illegible], sitting as a circuit justice, denied an application for suspension of an order denying certiorari or, in the alternative, for a stay of execution. In his opinion Justice Rehnquist stated:

> Applicant raises a second argument in his petition for rehearing that was not raised [illegible] the Arizona Supreme Court or in his earlier petition for certiorari. Applicant argues that the Arizona statute violates the Sixth, Eighth, and Fourteenth Amendments in failing to provide for jury input into the determination of [illegible] and mitigating circumstances [illegible] such jury input would not appear to [illegible] this Court's decision in Proffitt [illegible] U.S. 242, 96 S.Ct. 2960, [illegible]

434 U.S. at 1325, 98 U.S. at 9, 54 L.Ed.2d [illegible]. Jaimi correctly points out that this [illegible] to the entire Supreme Court, but only to Jus[illegible]. Jaimi argues that McMillan v. Pennsylvania, [illegible] 91 L.Ed.2d 67 (1986) supports his positio[illegible]. It is interesting that Justice Rehnquist [illegible] Court in McMillan, including the statement [illegible] Sixth Amendment right to jury sentencing [illegible] on specific findings of fact." [illegible] 91 L.Ed.2d at 76. In his decision Justice [illegible] for the proposition: "Sentencing courts [illegible] the circumstances of an offense [illegible] punishment, and we have consistently [illegible] that mandate consideration of [illegible]." 477 U.S. at 88, 106 S.Ct. at 2420, 91 L.Ed.2d at 76. The crux of the decision in McMillan was the conclusion that the fact at issue there -- visible possession of a firearm -- was not an element of the crimes for which the defendants were convicted, but were

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instead "a sentencing factor that comes into play only after the defendant has been found guilty ...." McMillan, 477 U.S. at 84, 106 S.Ct. at 2416, 91 L.Ed.2d at 72. That is how we view the aggravating circumstances listed in I.C. § 19-2515(g).

To accept Jaimi's argument that the jury must be involved in determining whether aggravating circumstances exist, we would have to conclude that the aggravating circumstances listed in I.C. § 19-2515(g) are elements of first degree murder. We are unable to reach that conclusion. The circumstances listed in the statute are clearly circumstances to be considered in sentencing and not elements of first degree murder. It is not unconstitutional for a judge, instead of a jury, to determine whether any of the aggravating circumstances listed in the statute exist.

Our opinion in this aspect of the case is not changed by the decision of the Ninth Circuit in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988). In Adamson the Ninth Circuit held Arizona's death penalty sentencing statutes to be in violation of the sixth amendment. During reargument of this case to determine what impact Adamson might have on our opinion here, the solicitor general for the state of Idaho acknowledged that there is no significant difference between the Arizona death penalty sentencing statutes and those of Idaho. Nevertheless, we are not convinced that Adamson correctly states the requirements of the sixth amendment on this issue.

Judicial sentencing in capital cases does not violate the sixth amendment. Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). Adamson attempts to distinguish Spaziano on the ground that in Spaziano "the Court never reached the particular contention Adamson has raised: that Arizona's capital sentencing statute requires the judge to determine elements of the offense charged, thereby taking this factual element out of the jury's hands in violation of the Sixth Amendment." 865 F.2d at 1028. We disagree.

In Spaziano the Court noted that the Florida capital sentencing statute that was at issue directed the sentencing judge "to determine whether statutory aggravating circumstances were

outweighed by statutory mitigating circumstances." 468 U.S. 450 n.4, 104 S.Ct. at 3157 n.4, 82 L.Ed.2d at 343 n.4. The Florida statute was similar in the important aspects to those portions of I.C. § 19-2515 relating to death penalty sentencing. The Florida statute provided that the sentencing judge should weigh the aggravating and mitigating circumstances. If the judge imposed a sentence of death, the judge was required to set forth in writing "findings upon which the sentence of death is based as to the facts: (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and (6) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 1972 Fla. Laws, ch. 72-724, Sec. 921.141(3)(b). The aggravating circumstances enumerated in the Florida law at issue in Spaziano were similar in some respects to those contained in I.C. § 19-2515(g). Significantly, one of the aggravating circumstances in Florida was: "The capital felony was especially heinous, atrocious, or cruel." 1972 Fla. Laws, ch. 72-724, Sec. 921.141(6)(h). This is substantially the same as I.C. § 19-2515(g)(5) that is at issue here, except that our statute adds the qualifying phrase, "manifesting exceptional depravity."

The Florida Supreme Court noted in its decision "the trial judge found that the circumstances of the offense were especially heinous, atrocious, and cruel, and secondly, found that the defendant was previously convicted of felonies involving the use or threat of violence to the person." Spaziano v. State, 393 So.2d 1119 (Fla. 1981). On certiorari the United States Supreme Court held:

> The fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause, however, does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial. ... The sentencer, whether judge or jury, has a constitutional obligation to evaluate the unique circumstances of the individual defendant and the sentencer's decision for life is final. Arizona v. Rumsey, [467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984)]. More important, despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other

> sentencing proceeding--a determination of the appropriate punishment to be imposed on an individual. [Citations omitted, except] Williams v. New York, 337 U.S. 241, 247-249, 69 S.Ct. 1079, 1083-1084, 93 L.Ed. 1337 (1949). The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.

468 U.S. at 454, 104 S.Ct. at 3161, 82 L.Ed.2d at 347.

These comments were made by the Court in considering death penalty sentencing by a judge under a statute substantially similar to our statute and with findings of aggravating circumstances similar to those here. This convinces us that the Court inherently considered and rejected the premise of the Ninth Circuit in Adamson: that a capital sentencing statute that requires the judge to determine aggravating circumstances takes this factual element out of the jury's hands in violation of the sixth amendment.

AS TO PART IX(A): SHEPARD, C.J., and BAKES, J., concur. BISTLINE and HUNTLEY, JJ., dissent.

B. The letter from Marilyn's father.

1. Hearsay.

Jaimi asserts that it was a violation of the hearsay rule for the trial court to admit the letter written by Marilyn's father. We agree.

Prior to the sentencing hearings, the second defense attorney filed a motion "for a formal sentencing hearing in accordance with the provisions of Idaho Code §§ 19-2515, 19-2516, and that the defendant be afforded all of the rights, both procedural and substantive, therein provided." I.C. § 19-2516 states:

> The circumstances [in aggravation or mitigation of punishment] must be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section.

I.C. § 19-2515(d) provides for a presentence investigation in all death penalty cases and states that after the investigation the court shall "convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation."

This Court has approved the consideration by a sentencing judge in a death penalty case of the presentence investigation report provided for in I.C. § 19-2515(d), despite the requirement for live testimony in I.C. § 19-2516. State v. Creech, 105 Idaho 362, 670 P.2d 463 (1983). In reaching its decision in that case this Court stated: "We hold that the closing language of I.C. § 19-2516 clearly and unambiguously provides an exception to the otherwise required oral testimony and that those authorizations of I.C. § 19-2515 fall within the purview of the intended exception." 105 Idaho at 368, 670 P.2d at 469. We note that in Creech the defendant had "demanded that the entire sentencing record be produced by live witnesses testifying in open court, basing his demand on I.C. §§ 19-2515 -2516 and the case law interpreting those statutes." 105 Idaho at 365, 670 P.2d at 466. Cf. State v. Coutts, 101 Idaho 110, 609 P.2d 642 (1980) and State v. Osborn, 102 Idaho 405, 631 P.2d 187 (1981) (no demand for a formal sentencing pursuant to I.C. § 19-2516).

The letter in question here was not part of a presentence report. Even if it had been, the hearsay could only have been included "where the presentence investigator believes that the information is reliable." I.C.R. 32(e)(1). Although the letter was offered and admitted at the time Mr. Arbaugh was testifying, permitting cross-examination of Mr. Arbaugh as to the statements made in the letter, this did not cure the hearsay nature of the statements. We construe I.C. § 19-2515(d) to permit the parties in a formal sentencing hearing to present all relevant evidence that would otherwise be admissible. Under Creech the contents of presentence investigation reports are an exception to this

requirement. The State would have us also except from the requirement for live testimony under I.C. § 19-2516 "all relevant evidence" as referred to in I.C. § 19-2515(d). This interpretation would make relevant hearsay admissible in a sentencing hearing, even though it was not included in a presentence investigation report.

We note that the Idaho Rules of Evidence, except those with respect to privileges, do not apply to sentencing proceedings. I.R.E. 101(e)(3). Therefore, there is no conflict between I.C. § 19-2515(d) and these rules that would render the statute of no force or effect under I.R.E. 1102. However, if we were to allow all relevant hearsay to be admitted in formal death penalty sentencing hearings we would destroy the requirement of I.C.R. 32(e)(1) that hearsay included in presentence reports be only that which the presentence investigator believes is reliable. The practice would quickly become for hearsay to be offered at the hearing rather than through the presentence report. Therefore, we hold that the letter should not have been admitted.

We are not dissuaded from our conclusion on this issue by the statement of the trial court in the written sentencing findings that he had "endeavored to avoid anything that might be hearsay, not absolutely pertinent or not totally supported by the evidence." (FINDINGS OF THE COURT IN CONSIDERING DEATH PENALTY UNDER I.C. 19-2515, p. 13) In a matter as awesome as the decision whether to impose the death penalty, a strict compliance with the procedures for sentencing is required. Even a well intentioned and conscientious effort by the trial court to avoid considering the hearsay contained in the letter does not suffice.

AS TO PART IX B(1): HUNTLEY, J., concurs.

BAKES, and BISTLINE, JJ., concur in the result.

SHEPARD, C.J., dissents.

2. Victim impact statement.

Jaimi also asserts that Mr. Arbaugh's letter should not have been admitted because it was a victim impact statement (VIS), prohibited in death penalty cases by Booth v. Maryland, 428 U.S.

496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). We agree. We also take this opportunity to advise the trial court on resentencing to apply Booth to the VIS contained in the presentence report.

In Booth the Court held that the introduction of a VIS at the sentencing phase of a capital murder case violates the eighth amendment to the United States Constitution. The Court held invalid a Maryland statute that requires consideration of a VIS describing the effect of the crime on the victim and the victim's family. Here, the State filed a motion for the trial court to receive Mr. Arbaugh's letter into evidence pursuant to I.C. § 19-5306(1)(b) and (3). That statute provides:

> (1) Upon request, each victim of a felony offense shall be:
>
> ....
>
> (b) Consulted by the presentence investigator during preparation of the presentence report and have included in that report a statement of the impact which the defendant's criminal conduct has had upon the victim;
>
> ....
>
> (3) The provisions of this section shall apply equally to the immediate families of homicide victims or immediate families of victims of such youthful age or incapacity as precludes them from exercising these rights personally.

This statute is similar to the Maryland statute considered by the Court in Booth.

The presentence report contains an indication that the investigator received both written and oral comments from Marilyn's parents. These comments were included in the report as a VIS. This VIS refers to the relationship between Marilyn and Jaimi, assaults on Marilyn by Jaimi on several occasions, pleas by Marilyn to Jaimi that he stay away from Marilyn and her children, statements by Marilyn to her father about threats made toward Tiffnie and Mr. Arbaugh by Jaimi, and a handwritten will by Marilyn naming her daughters as beneficiaries as a result of her

expectation of the outcome of the threats by Jaimi. The report also indicates that Marilyn's mother told the presentence investigator that Tira seemed to have withdrawn into herself after Marilyn's death. Marilyn's parents are reported by the presentence investigator to have a deep fear of Jaimi and to have expressed the hope that the trial court would take measures to insure the safety of themselves and Marilyn's two daughters.

Mr. Arbaugh's letter to the trial judge was written almost five months after the presentence report was submitted. Much of the information contained in the letter had already been included in the VIS portion of the presentence report. We note that the second defense attorney moved to strike the VIS portion of the presentence report.

In Booth the Court found that two types of information were included in the VIS: "First, it described the personal characteristics of the victims and the emotional impact of the crimes on the family. Second, it set forth the family members' opinions and characterizations of the crimes and the defendant." 482 U.S. at 500, 107 S.Ct. at 2533, 96 L.Ed.2d at 444. The Court found that "this information is irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." 482 U.S. at 500, 107 S.Ct. at 2533, 96 L.Ed.2d at 444. The letter did not contain the first type of information described in Booth, but did contain the second type. The VIS portion of the presentence report contained both types of information.

While sentencing in death penalty cases in Idaho is by a judge and not by a jury, as is the case in Maryland, we do not consider this to be a distinction that makes Booth inapplicable to a VIS in a death penalty case in Idaho. Although we have upheld sentencing by district judges in death penalty cases, we are not prepared to interpret the eighth amendment to give judges more latitude than juries in making their decisions as to whether a defendant should be executed. The risk of arbitrary and capricious decisions exists whether the sentence is determined by a jury or a judge.

Therefore, we hold that the letter should not have been considered by the trial court in the sentencing. We advise the trial court that when resentencing Jaimi, as provided below, Booth should also be applied to the VIS contained in the presentence report. We also declare that I.C. § 19-5306(1)(b) and (3) are unconstitutional under the eighth amendment insofar as they allow the two types of information proscribed in Booth to be considered in a death penalty case.

AS TO PART IX B(2): BAKES, BISTLINE and HUNTLEY, JJ., concur. SHEPARD, C.J., dissents.

C. Findings.

1. Did the trial court improperly consider aggravating circumstances not listed in I.C. § 19-2515?

Jaimi asserts the in its FINDINGS OF THE COURT IN CONSIDERING DEATH PENALTY UNDER I.C. 19-2515 (the Findings) the trial court improperly considered circumstances not listed in the statute. Secondarily, he asserts that he was gravely prejudiced because when the trial court considered these circumstances, he was denied notice that the trial court would predicate its sentence on these circumstances. We disagree with both of these assertions.

As an example of the findings that he argues were objectionable, Jaimi cites the portion of the Findings which states that at the time Tiffnie left the barn after finding her mother bleeding and wounded with Jaimi standing over her, "the life of Marilyn Arbaugh probably could have been saved if she had received the necessary medical attention." He argues that if he had been notified that the trial court intended to consider this circumstance, he would have contested the issue vigorously. He also contends that the consideration of these "non-statutory aggravating circumstances" violated the cruel and unusual punishment clause of the eighth amendment and permits circumstances not found beyond a reasonable doubt to enter the sentencing decision.

This Court has previously rejected all these arguments except the one based on the eighth amendment. Creech, 105 Idaho at 369-

70, 670 P.2d at 470-71; Sivak, 105 Idaho at 905, 674 P.2d at 401. With regard to the eighth amendment claim, we note that the trial court concluded the Findings by stating:

> This Court finds beyond a reasonable doubt that the facts establish the statutory aggravating circumstances set forth in Idaho Code Section 19-2515 (G)(5) and 19-2515 (G)(6). This murder was especially heinous, atrocious and cruel thereby manifesting exceptional depravity. Further by this murder and the circumstances surrounding its commission, Jaimi Dean Charboneau exhibited utter disregard for human life.

Through this portion of the Findings the trial court made clear that its decision was not based on non-statutory aggravating circumstances. Therefore, we need not address the eighth amendment argument.

AS TO PART IX C(1): SHEPARD, C.J., BAKES, and HUNTLEY, JJ., concur.

BISTLINE, J., dissents.

2. Findings not supported by evidence.

Jaimi asserts that there was not sufficient evidence to support a critical portion of the Findings. He challenges the following statement of the trial court:

> That after firing the first volly (sic) of shots the victim Marilyn Arbaugh was wounded but her life could have been saved if she had received necessary medical attention. At that moment the defendant, Jaimi Charboneau had a choice. He could have saved the woman he professed to love. However, with at least two minutes to give thought to the matter, the defendant, Jaimi Dean Charboneau, chose to fire additional shots into the wounded and helpless body of Marilyn Arbaugh. It appears from the facts that Jaimi Dean Charboneau acted intentionally, methodically and violently while he erased from the face of this earth the life of a human being.

Jaimi relies on the testimony of the State's pathologist to rebut the trial court's statement that Marilyn could have been saved, if

she had received necessary medical attention before the final shots were fired. The pathologist testified that the cause of death was gunshot wounds of the chest that severed arteries to the heart and lungs. He stated that he had no opinion as to which of the bullets caused the fatal wounds and that it was beyond the expertise of a pathologist to give an opinion as to the order in which the wounds occurred. There is no other evidence in the record that contradicts this testimony. Therefore, we agree that there is no evidence in the record that supports the trial court's statement.

It is unclear from the Findings whether the trial court would have imposed the death penalty without having concluded that Marilyn was not mortally wounded until the second volley of shots was fired. For that reason, together with others expressed above and below, we vacate the sentence and remand for resentencing.

AS TO PART IX C(2): BISTLINE and HUNTLEY, JJ., concur.

SHEPARD, C.J. and BAKES, J., dissent.

3. Mitigating factors.

Jaimi asserts that the trial court failed to list in the Findings all the mitigating factors that were presented. He argues particularly that the trial court failed to consider significant family information contained in the presentence report. We have compared the trial court's statement of mitigating factors with the presentence report and are unable to agree with Jaimi on this issue. All of the material mitigating information contained in the report is reflected in the Findings.

AS TO PART IX C(3): SHEPARD, C.J., BAKES, BISTLINE and HUNTLEY, JJ., concur.

4. Vagueness of I.C. § 19-2515(g)(5) and (6).

Jaimi asserts that I.C. § 19-2515(g)(5) and (6) are unconstitutionally vague and that their use in determining Jaimi's sentence violates the eighth amendment. He argues that Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) and Adamson v. Ricketts, 865 F.2d 1011 (1989) support his position with regard to I.C. § 19-2515(g)(5). He argues that the meaning

given to I.C. § 19-2515(g)(6) in State v. Osborn, 102 Idaho 405, 631 P.2d 187 (1981) was inadequate. We disagree.

In Maynard the Supreme Court held that the "especially heinous, atrocious, or cruel" aggravating circumstance of the Oklahoma death penalty statute was unconstitutionally vague under the eighth amendment because it did not offer sufficient guidance to the jury in deciding whether to impose the death penalty. The decision of the Tenth Circuit Court of Appeals that was affirmed in Maynard (Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987)) noted that the Oklahoma courts had not "adopted a limiting construction that cured the [vagueness] infirmity." 486 U.S. at ___, 108 S.Ct. at 1857, 100 L.Ed.2d at 376. In its opinion the Supreme Court also distinguished the situation in Maynard from that in Proffitt v. Florida, 428 U.S. 242, 254-56, 96 S.Ct. 2960, 2972-73, 49 L.Ed.2d 913, 925-26 (1976).

In Osborn this Court adopted the definition of "heinous, atrocious and cruel" of the Florida Supreme Court that was approved in Proffitt. This court quoted the following interpretation of the Florida court:

> "It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim." [Citation omitted.] (Emphasis added.)

102 Idaho at 418, 631 P.2d at 200.

This Court also adopted the definition of "exceptional depravity" of the Nebraska Supreme Court in State v. Simants, 197 Neb. 549, 250 N.W.2d 881, 891 (1977) cert. den., 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed.2d 158, reh. den., 434 U.S. 961, 98 S.Ct. 496, 54 L.Ed.2d 322 (1977). This Court quoted the following definition of the Nebraska court:

> "In interpreting this portion of the statute, the key word is 'exceptional.' It might be argued that every murder involves depravity. The use of the word 'exceptional,' however, confines it only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence."

102 Idaho at 418, 631 P.2d at 200.

We find that these definitions remove the vagueness from I.C. § 19-2515(g)(5) that would cause us to hold the use of it to be in violation of the eighth amendment according to Maynard.

In Osborn this Court also construed the "utter disregard for human life" provision of I.C. § 19-2515(g)(6):

> [W]e hold that the phrase "utter disregard" must be viewed in reference to acts other than those set forth in I.C. §§ 19-2515(f)(2), (3), and (4) [now §§ 19-2515(g)(2), (3), and (4)]. We conclude instead that the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i. e., the cold-blooded, pitiless slayer. With such an interpretation, it is our conclusion that this aggravating circumstance meets the constitutional requirements set forth by the United States Supreme Court.

102 Idaho at 419, 631 P.2d at 201.

We agree.

Our opinion as to this issue is not changed by Adamson v. Ricketts. In Adamson the Ninth Circuit held that the interpretation by the Arizona Supreme Court of the portion of Arizona's death penalty sentencing statute that is similar to I.C. § 19-2515(g)(5) was not sufficient "to provide satisfaction of Godfrey's [Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)] mandate that aggravating circumstances objectively guide discretion and narrow application of the death penalty." 865 F.2d at 1033. We note that Godfrey cited Proffitt v. Florida without distinguishing its rationale or its result. 446 U.S. at 425, 100 S.Ct. at 1764, 64 L.Ed.2d at 403. As we have

indicated above, the definition of "heinous, atrocious and cruel" adopted by this Court in Osborn was that of the Florida Supreme Court that was approved in Proffitt. Therefore, we are convinced that whatever validity there may be to the decision in Adamson concerning the Arizona definitions of their statutory terms, the definitions contained in Osborn remain constitutionally sufficient.

AS TO PART IX C(4): SHEPARD, C.J., BAKES and HUNTLEY, JJ., concur.

BISTLINE, J., dissents.

5. No duplication of aggravating circumstances.

The trial court found that the aggravating circumstances referred to in both I.C. § 19-2515(g)(5) and (6) were present in this case. Jaimi asserts that it was improper for the trial court to use both of these aggravating circumstances in determining his sentence, because they duplicate each other. Today, this Court has held that these two factors are not duplicative. State v. Fain, 1989 Slip Op. No. ____. Therefore, we reject Jaimi's assertion.

AS TO PART IX C(5): SHEPARD, C.J., BAKES and HUNTLEY, JJ., concur.

BISTLINE, J., dissents.

6. Weighing mitigating circumstances against I.C. § 19-2515(g)(5) and (6) separately.

I.C. § 19-2515(c) states:

> (c) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented

> outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

Jaimi asserts that this statute requires the trial court to weigh all the mitigating circumstances presented against each aggravating circumstance found, separately. He argues that if the trial court finds that all the mitigating circumstances presented outweigh any one of the aggravating circumstances found, then the sentence of death may not be imposed. He contends that this required weighing was done incorrectly by the trial court in this case. We agree that all the mitigating circumstances presented must be weighed against each of the aggravating circumstances separately. We hold that the trial court may not sentence the defendant to death, unless the trial court finds that all the mitigating circumstances outweigh the gravity of each of the aggravating circumstances found and make imposition of death unjust.

Criminal statutes must be strictly construed. State v. Thompson, 101 Idaho 430, 437, 614 P.2d 970, 977 (1980). I.C. § 19-2515(c) refers to "mitigating circumstances" that are to be weighed against "any aggravating circumstance found." If the legislature had intended the mitigating circumstances to be weighed against all the aggravating circumstances found as a group, it would have referred to "the aggravating circumstances found." The plain meaning of the statute dictates our conclusion on this issue.

We are unable to accept Jaimi's argument that the statute requires the trial court not to impose the death penalty, if the mitigating circumstances outweigh any one of the aggravating circumstances found. The plain meaning of the statute is that the mitigating circumstances must outweigh "any" of the aggravating circumstances. The word "any" means "whichever one chance may select." Webster's Third New International Dictionary, (1969). For the mitigating circumstance in this case to outweigh "any" aggravating circumstances found, the mitigating circumstances must outweigh each of the aggravating circumstances, since chance may select either one.

In its findings the trial court quoted I.C. § 19-2515 as stating:

> Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstances found and make imposition of death unjust. (Emphasis added).

In making its decision as to the appropriate sentence to impose, the trial court said:

> After due consideration to all the facts contained herein, the Court is unable to find any mitigating circumstances which would overcome or outweigh the aggravating circumstances and must therefore comply with the legislature's mandate. (Emphasis added).

It appears to us that the trial court weighed all the mitigating circumstances against the two aggravating circumstances found, collectively rather than separately. For this reason also, we vacate the sentence and remand for resentencing in accordance with our decision.

AS TO PART IX C(6): SHEPARD, C.J., BAKES, BISTLINE and HUNTLEY, JJ., concur.

7. Presumption of death.

Jaimi asserts that I.C. § 19-2515 violates the eighth and fourteenth amendments because it places the burden on a defendant to prove the existence of mitigating circumstances that outweigh any aggravating circumstance that is found. We disagree.

I.C. § 19-2515(c) presumes that a life sentence is the sentence for first degree murder. Only if at least one of the aggravating circumstances listed in I.C. § 19-2515(g) is found to exist beyond a reasonable doubt may a sentence of death be imposed. It is only then that a defendant has the burden of coming forward with mitigating circumstances. To the extent that Adamson reaches a contrary result, we disagree with the Ninth Circuit.

AS TO PART IX C(7): SHEPARD, C.J., BAKES, BISTLINE and HUNTLEY, JJ., concur.

X.

AUTOMATIC REVIEW UNDER I.C. § 19-2827.

A. Was the sentence imposed under the influence of passion, prejudice, or any other arbitrary factor?

Jaimi asserts that the sentence of death in this case was arbitrary because there was no evidence to support portions of the Findings that we have reviewed above. To the extent of our holdings above that there was not sufficient evidence to support portions of the Findings, we agree. We disagree that there was arbitrariness because mitigating factors concerning Jaimi's family background were not considered. We also disagree that there was arbitrariness because this was an act of passion rather than a case involving malice aforethought. That question was submitted to the jury, and the jury found otherwise.

B. Did the evidence support the findings of a statutory aggravating circumstance under I.C. § 19-2515?

We have held above that there was no evidence in the record to support the trial court's statement that Jaimi could have saved Marilyn's life, if he had sought medical attention for her. We have also held that it was a violation of Booth v. Maryland and the hearsay rule for the trial court to admit and consider the letter written by Marilyn's father. Therefore, it is unnecessary for us to consider at this time whether the evidence supports a finding of either statutory aggravating circumstance under I.C. § 19-2515(g)(5) and (6). This review can be made following resentencing, if it is necessary.

C. Was the sentence excessive or disproportionate to the penalty imposed in similar cases?

In light of our decision to vacate the sentence, this review is also unnecessary.

AS TO PART X: HUNTLEY, J., concurs.

SHEPARD, C.J., concurs in result.

BAKES, J., concurs in all of Part X, except that part which incorporates the analysis of Part IX(C)(2), with which he disagrees.

BISTLINE, J., expresses no opinion.

XI.

CONCLUSION.

For the reasons stated above, we affirm the conviction, vacate the sentence, and remand for resentencing.

SHEPARD, C.J. concurring in part and dissenting in part.

I concur in the majority opinion except parts IX B and IX C(2), and as to those portions I disagree and therefore dissent.

The majority holds that during the sentencing procedure a letter written by the father of the victim was improperly "admitted" in violation of the hearsay rule. This, although the report of the presentence investigator, is also hearsay and in fact hearsay upon hearsay. I believe the focus of the majority opinion, the hearsay rule, is inapplicable. In my view the letter, while "hearsay," was at worst only duplicative of the oral testimony of that same witness at the sentencing hearing. That oral testimony taken in open court was subject to cross-examination. Hence the admission of the letter written by the father of the victim was at most harmless error.

The testimony of that witness, both oral and written, in essence related the well justified fear of the remaining members of the family of defendant Charboneau. In my view such evidence was particularly relevant since, as indicated by the majority opinion, the defendant Charboneau had accused his stepdaughter of the killing.

I also disagree with the majority holding that *Booth v. Maryland*, ___ U.S. ___ (1987), requires the exclusion of the Arbaugh letter, and portions of the presentence report as being a "victim impact statement." *Booth* was a jury setting death penalty case rather than a court setting death penalty case. That alone, in my view, makes *Booth* distinguishable from the instant case. Further, *Booth* was a 5-4 decision by the then membership of the then Court. In view of the vigorous dissents to *Booth* and the now changed membership of that Court, I am not persuaded that the now constituted United States Supreme Court would continue the view espoused in *Booth*.

I.C. § 19-5306 requires a sentencing court to consider the impact of the crime upon the immediate families of homicide victims. I perceive no constitutional invalidity of that statutory scheme since here we consider only Idaho's mandated court setting of the death penalty.

I disagree with the conclusion of the majority in IX C(2). In my view the majority opinion, in its recitation of the facts, supports the language of the trial court in its sentencing. The testimony of Tiffnie supports the statement of the trial court.

I would affirm the conviction and the imposition of the death penalty.

HUNTLEY, J., concurring and dissenting.

While I support the death penalty and concur in the bulk of the majority opinion, I respectfully suggest that Idaho's present capital sentencing procedure is unconstitutional because it removes the jury from its constitutional fact-finding role. Our process violates the federal constitution for the reasons stated in Adamson v. Ricketts, (Ct. App. 9th Cir., December 22, 1988) and violates the Idaho Constitution for the reasons I have articulated in State v. Creech, 105 Idaho 362, 670 P.2d 463 (1983) and State v. Sivak, 105 Idaho 900, 674 P.2d 396 (1983). I will discuss each analysis in turn.

I.

The Jury as Fundamental to Preserving Democracy

The determination of the issue presented on appeal should be made in the context of the history and purposes of the right to trial by jury. Our forefathers wisely provided in Article 1, Section 7 of the Idaho Constitution: "The right to trial by jury shall remain inviolate . . ." They so provided because they recognized that the jury system is the single most important guardian of the people's right to be protected from oppressive and overreaching government.

Few Americans realize that the right to jury trial in civil cases has almost been lost in England. English judges, with the acquiescence of a compliant bar, have totally eliminated the right to trial by jury in civil cases, except in cases of libel or slander. The

English themselves seem to have forgotten the words of their eminent jurist, Blackstone, who wrote that trial by jury is:

> . . . the glory of the English law . . . [i]t is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected in his property, his liberty, or his person but by the unanimous consent of twelve of his neighbors and equals.

Blackstone Commentaries 79.

Some American judges and legislators have similarly lost touch with the following language in our Declaration of Independence:

> [George III] has combined with others to subject us to a jurisdiction foreign to our Constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation: . . . For depriving us, in many cases, of the benefits of trial by jury. . .

The French philosopher and essayist, de Tocqueville, who understood and appreciated democracy in America with keener insight than any other observer of the Nineteenth Century, stated that the jury system in America:

> . . . places the real direction of society in the hands of the governed . . . and not in . . . the government . . . He who punishes the criminal . . . is the real master of society. All the sovereigns who have chosen to govern by their own authority and to direct society, instead of obeying its direction, have destroyed or enfeebled the institution of the jury.

Those who believe in strict construction of our Constitution recognize that the judiciary's oath to "support and defend the Constitution" requires that we resist the temptation to enhance judicial power through encroachment into the provinces constitutionally delegated to the jury.

II.

The Federal Right to Jury Fact Finding in Capital Cases

In Adamson v. Ricketts, the 9th Circuit stated the issue:

> Adamson also contends that the Arizona statutory scheme for imposing the death penalty erroneously lists elements of the offense as factors to be determined by the sentencing judge, thus depriving him of his right to a jury decision on the elements of the crime in violation of the Sixth and Fourteenth Amendments. We agree.

The Idaho sentencing procedure under I.C. § 19-2515 is virtually identical in all material respects to the defective Arizona statutory scheme. Noteworthy is the fact that Idaho and Arizona are two of only four states which have the death penalty which have taken the jury out of the fact-finding process of making the ultimate determination as to whether the death penalty is appropriate. The fact that thirty-one of the thirty-five states which have the death penalty utilize the jury in making that determination speaks volumes as to what our Anglo-American traditions and constitutions require.

As the Adamson court noted:

> An aggravating "circumstance" which elevates a murder to a "death-eligible" murder in the penalty phase, remarkably mirrors the attributes of an essential element of the offense during the guilt phase of a trial. Like an element of a crime, an aggravating circumstance in the Arizona scheme informs the prosecutor what facts must be proven to obtain a conviction. The circumstance must be proven beyond a reasonable doubt. The hearing is adversarial, with oral argument and the prosecution's presentation of evidence governed by the usual rules of evidence. The presiding trial judge must make findings on the existence or nonexistence of each of the statutory aggravating and mitigating circumstances. If the judge finds an aggravating circumstance, the burden then shifts to the defendant who must put on sufficient evidence of mitigation or the death penalty will be imposed. A.R.S. § 13-703; see also Arizona v. Rumsey, 467 U.S. 203, 21 (1984). If the prosecution is unable to prove the existence of a single aggravating circumstance, like not proving an essential element, the defendant cannot be put to death. Cf. Poland v. Arizona, 106 S.Ct. 1749, 17454 (1986) (Court framed the relevant [*39] inquiry as "whether the sentencing judge or the reviewing court has "decid[ed] that the prosecution has not proved its case for the death penalty and hence has 'acquitted' petitioners"); Rumsey, 467 U.S. at 212 (where findings of fact at sentencing hearing were all favorable to defendant, he was "acquitted" of the death penalty).

Although Idaho's majority in Charboneau, similarly to the judiciary in Arizona and the prosecutors in both states, urge that a trial court in finding facts as to aggravating circumstances is exercising a "sentencing determination" as distinguished from finding the elements of a death-eligible murder, their use of the language in justifying that position frequently results in Freudian slips which indicate otherwise. In fact, to rule for the state's position it is necessary to do exactly what the majority did in this case, that is, engage in a circular argument, the majority reasoning at pages 28-29:

> To accept Jaimi's argument that the jury must be involved in determining whether aggravating circumstances exist, we would have to conclude that the aggravating circumstances listed in I.C. § 19-2515(g) are elements of first degree murder. We are unable to reach that conclusion. The circumstances listed in the statute are clearly circumstances to be considered in sentencing and not elements of first degree murder. It is not unconstitutional for a judge, instead of a jury, to determine whether any of the aggravating circumstances listed in the statute exist.

The sentence I have underscored is totally circular. Of course, if one can pronounce that the circumstances are part of sentencing and not part of the elements of a death penalty crime, then they are not elements of a death penalty crime.

The plain fact is, before a person is eligible to be executed, a finding must be made that the aggravating circumstance existed. That finding is typically a jury finding, it was a jury function in Idaho from territorial days through 1977, and is a fact to be found by the jury in all but four of the states which have the death penalty.

It could of course be argued that my position is circular if I were to take the underscored sentence from the majority opinion, supra, and restate it as follows:

> The circumstances listed in the statute are not circumstances to be considered in sentencing but are elements of death-eligible murder.

However, I would submit that the issue is best resolved by recognizing that it is traditional and accepted jurisprudence that every factor required to prove a crime is considered an element of that crime. One cannot be sentenced to death without the finding of the aggravating circumstances having taken place and, thus, they would appear to be essential

elements of the crime rather than some less important procedural matters occurring during sentencing.

The United States Supreme Court has not passed directly upon the issue presented in this case, but what it has written about the jury and its function in death penalty cases indicates that the process would be best served by bringing the four states in line at this time.

Since the Court has held that death sentences must comport with the community's sense of evolving standards of decency and its legitimate desire for moral retribution, an essential question is whether judges alone can reliably reflect the communal values that are the source of the constitutionality of capital punishment.

By definition, juries, not judges, are "the cross-section of the community," reflecting community values. Duren v. Missouri, 439 U.S. 357, 359 99 S.Ct. 664, 666, 58 L.Ed.2d 579 (1979). Only a representative jury assures "meaningful community participation." Ballew v. Georgia, 435 U.S. 223, 235 98 S.Ct. 1029, 1036, 55 L.Ed.2d 234 (1978) (plurality opinion). Jurors, unlike judges, are selected to enhance the likelihood that they represent the whole range of community beliefs and backgrounds, Taylor v. Louisiana, 419 U.S. 522, 531-33 95 S.Ct. 692, 698-699, 42 L.Ed.2d 690 (1975); the different segments of the community bring to the representative jury "perspectives and values that influence both jury deliberation and result," id. at 532 n. 12 95 S.Ct. at 698 n. 12. See Humphrey v. Cady, 405 U.S. 504, 509 92 s.Ct. 1048, 1052, 31 L.Ed.2d 394 (1972). Moreover the sheer difference in size between a twelve-member jury panel and a single judge may bear significantly on the validity of a sentencing decision under the Eighth Amendment. Canvassing expert empirical studies, the United States Supreme Court has concluded that the likelihood that a decision in a criminal case correctly applies "the common sense of the community to the facts" increases with the number of decisionmakers. Ballew v.

Georgia, supra, 435 U.S. at 232 98 S.Ct. at 1035.[1] Twelve individuals are obviously more likely to reflect the prevailing views of society than one person.[2]

A jury need not engage in questionable speculation to determine what community sentiment would say in a particular case. Its very function is to bespeak that community sentiment by exercising its own judgment. The jury's response is society's response. Witherspoon v. Illinois, supra, 391 U.S. at 519-20 88 S.Ct.at 1775-1776. "The jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved," Gregg v. Georgia, supra, 428 U.S. at 181 96 s.Ct. at 2928. By contrast, judges cannot themselves speak for community sentiment. If they are to fulfill the demands of the Eighth Amendment by bringing evolving standards of decency and principles of retribution to bear in a capital punishment case, they can do so only indirectly since "[C]ourts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits." Dennis v. United States, 341 U.S. 494, 525 71 S.Ct. 857, 875, 95 L.Ed. 1137 (1951) (Frankfurter, J., concurring). Unable to represent community sentiment, a judge must undertake to ascertain it. That is necessarily a difficult task,[3]

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[1] Ballew also amassed considerable empirical evidence to prove that reducing the number of decisionmakers in a criminal case impairs the accuracy, fairness, thoroughness and consistency of the decision, generally to the detriment of the defendant. Ballew v. Georgia, 435 U.S. 223, 232-39 [98 S.Ct. 1029, 1035-38, 55 L.Ed.2d 234] (1978) (plurality opinion).

[2] Significantly, every state authorizing jury involvement in capital sentencing appears to require a jury of twelve persons. S.Gillers, Deciding Who Dies, 129 U.Pa.L.Rev. 63, n. 298.

[3] Judges may theoretically have access to community sentiment through social contact, as well as through such sources as polls, editorials, journals, and newspaper reports. Cook, Public Opinion and Federal Judicial Policy, 21 Am.J.Pol.Sci. 567, 576 (1977). Unfortunately, these sources greatly overstate the willingness of members of the community to impose the death penalty on specific defendants for specific crimes. Research on jury behavior reveals that jurors are substantially more lenient when trying an actual case and sitting through deliberations than they will otherwise indicate. Aeisel & Diamond, The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal

made even more difficult because judges--whether considered in terms of race, sex, or economic class--do not reflect the wide range of backgrounds or beliefs within the community.[4] "[T]he reluctance of juries in many cases to impose the sentence [of death] may well reflect the humane feeling that this most irrevocable sanction should be reserved for a small number of extreme cases," Gregg v. Georgia, supra, 428 U.S. at 182 96 S.Ct. at 2929. For a variety of reasons, judges appear less likely to reflect that same reluctance.[5]

District Court, 30 Stan.L.Rev. 491, 511-12 (1978) (shadow juries drawn randomly and not subject to peremptory challenges vote guilty far more often than real juries; probably because the defendant's liberty was not in their hands). People who favor the death penalty in the abstract are more lenient when presented with descriptions of actual cases.

[4] As of 1979 judges in state courts of general trial jurisdiction earned salaries ranging from $24,000 in Oklahoma to $54,205 in California, with a mean of approximately $41,000. Nat'l Center for St. Cts., Survey of Judicial Salaries 1 (Sept. 1979). As of 1977 in these general jurisdiction courts, only 2.5 percent of the 5,155 judges were women, and 20 states had no women at all on these courts. Cook, Women Judges: The End of Tokenism, in Women in the Courts, 84, 87-88 (Nat'l Center for St. Cts. 1978). It appears that as of 1977 only 2.6 percent of the judges on these general trial courts were black. G.W. Crockett, Number and Distribution of Black Judges (March 1977) (unpublished charts on file with Nat'l Center for St. Cts.). Finally, the rigorous educational requirements for admission to the bar make it inevitable that the average educational attainment of judges will far exceed that of the community in general.

[5] Kalven and Zeisel's classic report shows that judges and juries disagree in a substantial number of cases. In a study of 3576 trials, judge and jury reached the same decision about a criminal defendant only 72 percent of the time. H. Kalven & H. Zeisel, The American Jury, 68 (1966). In their specific study of the death penalty, the authors report that judge and jury disagreed about the imposition of a death sentence in 19 percent of the cases, id, at 436. To view the results yet another way, in those cases where one or both recommended death, judge and jury disagreed 60 percent of the time. In those cases in which either the judge or jury or both would have voted for the death penalty, in 40 percent, judge and jury agreed, and in 40 percent only the judge would have voted for the death penalty, yet in only 20 percent of the cases would the jury but not the judge vote for execution. Thus, the juries were essentially twice as lenient as the judges. Ibid. As a United Nations Report concludes:

As a means of reliably reflecting community sentiment on capital punishment, bringing lay jurors into the sentencing process "'places the real direction of society in the hands of the governed . . . and not in . . . the government.'" Powell, Jury Trial of Crimes, 23 Wash. & Lee L.Rev. 1, 5 (1966) quoting de Tocqueville, Democracy in America 282

> "[A]mong the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favour the retention of capital punishment. The specialists of the social sciences, penologists, doctors and writers on social science or criminology are, in their great majority, abolitionists. The supporters of capital punishment, apart from a number of political figures and persons holding high public office, are generally jurists with a traditional training and judges."

United Nations, Dept. of Economic and Social Affairs, Capital Punishment (ST/SOA/SD/9-10-64) (1968).

The reason for these differences may lie in the greater reluctance of judges to depart from what they perceive to be the letter of the law. See, e.g., Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 71 L.Ed.2d 1 (1982). Kalven and Zeisel discovered in more than one judge "a kind of envy of the freedom of the jury to reach a decision which he as a judge could not reach" Kalven & Zeisel, supra, at 428. The judge's role as a strict enforcer even restricts his discretion in sentencing decisions where that discretion would seem to be wholly lawful. As one judge said of draft evasion cases: "I am opposed to conscription. I also believe that the war in Vietnam is both immoral and impractical. My sentencing policies are based upon the fact that as long as law exists, it should be imposed to effectuate its intent and purpose." Cook, Sentencing Behavior of Federal Judges: Draft Cases--1972, 42 Cinn.L.Rev. 597, 623 (1973). At the same time, Cook's study also reveals that as judges (unlike individual jurors) accrue experience in a given type of case, their sentencing settles into distinct and regular patterns of severity or leniency, id., at 602-03, so that the judge's first decision whether a person lives or dies may inspire far more deliberation and consideration than subsequent decisions. For individual jurors, however, the gravity with which they approach their decisions in capital cases will rarely be affected by such routinization.

Florida studies cited in Gillers, supra, note 2, at 67-68 n. 318, report that sentencing judges were significantly more inclined to impose death than the juries that recommended sentences to them. The studies also show that the judges' decisions seem to correlate with the race, sex, and social background of the defendant and victim, while the juries showed no evidence of any such biases.

(Reeve Tran.1948). Quintessentially, the right to a jury "is granted to criminal defendants in order to prevent oppression by the government," Duncan v. Louisiana, 391 U.S. 145, 155 88 S.Ct. 1444, 1450, 20 L.Ed.2d 491 (1968), and to protect against "arbitrary action" by the compliant, biased, or eccentric judge. Id. at 156 88 S.Ct. at 1451. It "reflects a fundamental decision about the exercise of official power--a reluctance to entrust plenary powers over the life and liberty of the citizens to one judge or to a group of judges." Ibid.[6] These concerns are even more compelling where life stands immediately in the balance.

III.

The Idaho Constitutional Mandate

The Idaho Constitution, as first approved on July 3, 1890, and as it reads today, provides in Art. 1, § 7:

"Right to trial by jury. -- The right of trial by jury shall remain inviolate . . . ." That right of trial by jury as it existed at the time our constitution was adopted, provided

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[6] The Profitt plurality's speculation that "judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury and therefore is better able to impose sentences similar to those imposed in analogous cases," Proffitt v. Florida, 428 U.S. 242, 252 96 S.Ct. 2960, 2966, must, of course, be read in the context in which it was made: as a statement of the probable result of the Florida system in which an advisory jury sentence may be mitigated at the discretion of the trial judge, or increased from life imprisonment to death only where a life sentence would be manifestly unreasonable. Id. at 249-50 96 S.Ct. at 2965-2966. Moreover, empirical evidence suggests that individual state trial judges are not likely to achieve consistency among death sentences meted out across the state. Gillers, supra, note 2, at 58-59. Cook, Public Opinion and Federal Judicial Policy, 21 Am.J.Poli.Sci. 567, 623 (1977). Rather the state can better take advantage of the purported ability of judges to ensure consistency in capital sentencing, at no cost to the defendant's right to jury sentencing, by relying on the automatic appeal procedure by which this Court must review each death sentence in comparison to other cases involving similar crimes or defendants. I.C. § 19-2827. See, Gregg v. Georgia, 428 U.S., at 204-06 96 S.Ct. at 2939-2940; id, at 211-12, 96 S.Ct. at 2942-2943 (White, J., concurring).

for jury participation in the capital sentencing process. Section 17 of the Criminal Practice Act of 1864 provided in pertinent part:

> [A]nd the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict, whether it be murder of the first or second degree; but, if such person shall be convicted on confession in open court, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly. Every person convicted of murder of the first degree, shall suffer death, and every person guilty of murder in the second degree is punishable by imprisonment in the territorial prison for a term not less than ten years, and which may be extended to life.

Section 17 was carried over verbatim into Revised Statute § 6563 (1887) enacted two years before the adoption of the Constitution.

In other words, the jury, by determining whether the party was guilty of either first or second degree murder, determined whether or not the death penalty would be imposed.

In Blue Note Inc v. Hopper, 85 Idaho 152, 157, 377 P.2d 373 (1962), we stated:

> The provisions of the constitution pertaining to the right to trial by jury are construed to apply as it existed at the date of the adoption of the constitution.

Accord. Anderson v. Whipple, 71 Idaho 112, 227 P.2d 351 (1951); Christensen v. Hollingsworth, 6 Idaho 87, 53 P. 211 (1898); Comish v. Smith, 97 Idaho 89, 540 P.2d 274 (1975).

Idaho continued to employ the jury in the capital sentencing process during all of the intervening years until the Supreme court of the United States struck down the death penalty statutes of most states through its 1972 decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346.

At the time of Furman, I.C. § 18-4004 read:

> Punishment for murder. -- Every person guilty of murder in the first degree shall suffer death or be punished by imprisonment in the state prison for life, and the jury may decide which punishment shall be inflicted. Every person guilty of murder in the second degree is punishable by

> imprisonment in the state prison not less than ten years and the imprisonment may extend to life.

In its first post-Furman session (1973), the Idaho legislature deleted the jury function from I.C. § 18-4004 and made all convictions of first degree murder subject to the death penalty. This was done in an attempt to remove the "cruel and unusual punishment" aspects disapproved in Furman. I.C. § 18-4004 was amended by striking out the words as lined out below:

> 18-4004. PUNISHMENT FOR MURDER.-- Every person guilty of murder in the first degree shall suffer death ~~or be punished by imprisonment in the state prison for life, and the jury may decide which punishment shall be inflicted.~~ Every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than ten years and the imprisonment may extend to life.

The 1973 Amendment restored the law to its 1864 standing.

After the United States Supreme Court in a series of cases declared statutes of other states which were similar to Idaho's 1973 version unconstitutional, the Idaho legislature responded in 1977 with the present statutory scheme providing for inquiry into mitigating or aggravating circumstances as set forth in I.C. § 19-2515 et seq. That amendment changed the statute back to its pre-1973 language except that it omitted restoring the jury function and added the reference to I.C. § 19-2515:

> 18-4004. PUNISHMENT FOR MURDER. ~~Every~~ Subject to the provisions of 19-2515, Idaho Code, every person guilty of murder ~~in~~ of the first degree shall ~~suffer~~ be punished by death or by imprisonment for life. Every person guilty of murder ~~in~~ of the second degree is punishable by imprisonment ~~in the state prison~~ not less than ten (10) years and the imprisonment may extend to life.

Except for four states which entirely abolished capital punishment in the nineteenth century, every American jurisdiction has at least at some time employed jury sentencing in capital cases. McGautha v. California, 402 U.S. 183, 200 n. 11, 91 S.Ct. 1454, 1463 n. 11, 29 L.Ed.2d 711 (1971). During a period of over a century, beginning in 1838, jurisdiction after jurisdiction that retained the death penalty replaced its mandatory capital punishment law with discretionary jury sentencing, Woodson v. North Carolina, 428 U.S.

280, 291-92, 96 S.Ct. 2978, 2985, 49 L.Ed.2d 944 (1976) (plurality opinion). By the time of the Furman decision in 1972, Colorado was the only state in the nation to impose capital punishment without jury involvement in the sentencing process.

Despite the long history at common law and under statutory law of the states throughout this nation of involving jury in the capital sentencing process, the Idaho legislature in the present statute enacted in 1977 totally excluded the jury from its traditional function. The legislative history shows that the legislature was not even presented with a bill which provided for jury participation. The only bill presented, was one drafted by the attorney general, Senate Bill 1082, which was presented to the legislature with the following statement of purpose:

RS 1954
S 1082
STATEMENT OF PURPOSE

> Only a few years ago, the United States Supreme court made new "rules" concerning the imposition of the death penalty for serious crimes. So that we conformed with this U.S. Supreme Court interpretation of the federal Constitution, the Idaho Legislature enacted in 1973 our present death penalty Section 18-4003 and 18-4004, Idaho Code.
>
> Then, last year, the United States Supreme court again changed the rules relating to capital punishment--after many states, like Idaho, had acted in response to its previous decision. The Court, in five cases, set forth new, more definitive rules concerning sentencing where the death penalty was sought to be imposed.
>
> The purpose of this bill is to codify into Idaho law these present requirements imposed on the states by these most recent United States Supreme Court decisions on capital punishment so that we will conform with this latest expression of the law. (Emphasis supplied.)

The statement of purpose is misleading insofar as it suggests that the Supreme Court decisions mandated the removal of the jury from its traditional powers and functions; the United States Supreme court never at an earlier time or in this "latest expression of the law" required jury non-involvement.

Since jury participation in the capital sentencing process is part of the right to "trial by jury" as guaranteed inviolate by Art. 1, § 7 of the Idaho Constitution, I would reverse and remand for proper sentencing and would urge the legislature to amend the statutes to provide for proper jury participation in order that future capital punishment cases will not be subject to this serious defect.

IV.

Interim Solution by District Judges

Since this Court has not seen fit to bring the Idaho sentencing process into a constitutional posture, and since the current session of the Idaho Legislature has not even formally taken up the effect of Adamson, we are undoubtably going to be faced with a year or more of uncertainty while we await the review of Adamson by the United States Supreme Court on Certiorari. Should the 9th Circuit be affirmed, then all death sentence cases in Idaho which have been imposed in that interim period will have to be reversed and remanded for resentencing, if not a total new trial. I believe there is a method whereby our Idaho district judges, exercising their intelligence and their plenary power, can bring order to this chaos and validly complete capital cases. It has always been the law of Idaho that district judges have the power to call for advisory juries in cases where juries are not mandated by statute or common law. Our district judges could, on their own motion, adopt the procedures of the thirty-one other states by bifurcating the trial and bringing the jury in as an advisory jury at the sentencing phase. So that the jury would be fully apprised of the seriousness of its undertaking, the district judge would inform the jury that he would not impose the death penalty unless they so recommended. The district judge would, of course, retain his traditional power under Idaho law to impose a sentence less than death if he deemed such reduction appropriate. By engaging in this procedure, a district judge would not only be doing a service to the taxpayers by way of judicial economy in obviating the need for retrials or resentencing, but additionally the court would be properly serving both society and the defendant by protecting the constitutional right to trial by jury.

BISTLINE, J. dissenting.

I

In this capital murder case, where the guilt of the accused would be determined by a jury, and where a guilty verdict might be of murder in the first degree, murder in the second degree, or voluntary manslaughter, defense counsel's first strategic tactic was to utilize the results of a SEANCE conducted by a spiritualist; from the report of this seance counsel unquestionably believed that he had received the "true facts" concerning the homicide caused by gun shot wounds. Armed with the "true facts," counsel then devoted his talents toward convincing the prosecutors that the real culprit was not defendant, but the deceased's daughter. Having wholly succumbed to relying entirely on that hypothesis, counsel not only forewent making any of the ordinary preparations for a defense, but, even more damaging to the defendant, exposed him for uncounseled interrogation by prosecuting authorities.

Generally, a person's willingness to learn life's past or future secrets from a spiritualist, fortune-teller, a seer or even a Ouija board, would be of no concern. However, if Charboneau's then counsel was rendering "effective assistance of counsel," as the majority today holds, then the sixth amendment's guarantee of right to counsel has flown the coop. As Chief Justice Shepard has written, there is no insurance that defendants will receive a perfect trial -- there is only the guarantee of a fair trial. A fair trial cannot be had if a defendant is precluded from being represented by counsel who is knowledgeable and competent. Such was not the circumstance here. Worse yet, the defendant appears to have had no outside counselling or advice of any kind which would have informed him that he was being inadvertently escorted down the primrose path. The defendant could have fared no worse had he been in charge of his own case. The record makes it readily apparent that defense counsel simply was not aware that his efforts were bizarre, and, equally unaware that counsel's chosen course of conduct was extremely prejudicial to his client's constitutional right to remain silent.

This Court has properly recognized that the Idaho Constitution, where appropriate, can provide more protection than its federal counterpart.[7] However, the Idaho Supreme Court cannot, through the magic wand of a judicial decree, disavow or disregard the sixth amendment protections guaranteed by the Constitution of the United States.[8] Unless and until the federal courts in *habeas corpus* or post-conviction relief proceedings hereafter intercedes, the ineffective assistance of counsel doctrine in this jurisdiction has today been rendered meaningless.[9]

II

In addition, the majority has reacted to the well-reasoned decision of the *en banc* Ninth Circuit Court of Appeals in *Adamson v. Ricketts*, ___ F.2d ___ (filed December 22, 1988), by rejecting it even before there has been any review by the Supreme Court of the United States. In that manner, Charboneau and other capital defendants similarly situated are deprived of the fundamental right to jury sentencing guaranteed by both art. 1, § 7 to the Idaho Constitution and the sixth amendment to the Constitution of the United States. These concerns will be addressed in turn.

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Initially, the majority sets the stage for this aberration by failing to understand and utilize the proper standard of review. Under the seminal case of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 674 (1989), a criminal defendant must establish: (a) counsel's deficient performance, and (b) prejudice. With this much the majority is in

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[7] *See State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (1988) (Idaho Constitution prohibits use of roadblocks designed to apprehend drunk drivers absent warrant or probable cause); *State v. Thompson*, 114 Idaho 746, 760 P.2d 1162 (1988) (Idaho Constitution prohibits use of pen registers on citizens' telephones absent warrant or probable cause).

[8] Article 1, § 3 of the Idaho Constitution provides: "The state of Idaho is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land."

[9] I concur in Parts III, IV, V, IX(B)(1) (with explanation), IX(B)(2), IX(C)(2), IX(C)(3), IX(C)(6), IX(C)(7) and dissent to Parts I, II, VI, IX(A), IX(C)(1), IX(C)(4) and IX(C)(5). I express no opinion as to Parts VII, VIII, X and XI, because a proper resolution of this case would render those issues entirely moot.

accord. However, under the prejudice prong, it does not have to be shown that without counsel's error the defendant would have otherwise earned an acquittal. The heavy burden of such an outcome-determinative test was specifically rejected by the Supreme Court in *Strickland*. Although such a standard is appropriate for assessing a motion for a new trial based on newly discovered evidence, in regard to ineffective assistance of counsel claims, the defendant need only establish ". . . that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 104 S. Ct. at 2068 (emphasis added).

Thus, the majority rejects *Strickland's* mandate and affixes to Charboneau the burden of proving the result of the trial would have been different absent the replete errors of commission and omission attributable to defense counsel, specifically placing all reliance on the results of the seance and at the same time making not even a cursory attempt at preparation for an extremely crucial trial.[10]

Not only does the majority fail to comprehend the proper standard for evaluating ineffective assistance of counsel claims, it also shows little regard for the record. Without question, counsel Bennett relied upon the results provided from a seance in charting the course for his representation of Charboneau. The prosecutor who originally handled this case for Jerome County testified to his knowledge that Bennett contacted his niece in California, a clairvoyant, that through a seance the niece was able to "contact" the victim, Marilyn Arbaugh, that the spirit of Marilyn stated that her murderer was not Charboneau, but her daughter Tiffnie, and that the fatal shot was from a different gun not belonging to Charboneau. The prosecutor's testimony:

Q. Will you, please, state your full name for the record.

A. Dannis M. Adamson.

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[10] The majority opinion states: "It is Charboneau's burden to prove that the result would have been different, if he had not testified at the hearing on the motion to dismiss." Slip Op. at 12 (emphasis added). Such a burden is unrealistic. Absent a retrial, that theorem is unsusceptible of proof. The fact is that defense counsel did make the decision to have Charboneau testify.

Q. And where do you live?

A. I live seven north, three east of Jerome.

Q. Okay. And your occupation, please?

A. I'm an attorney.

Q. How long have you been an attorney?

A. Since 1979.

Q. All right. I understand you were prosecuting attorney here in Jerome for a while; is that correct?

A. That's correct. For the last part of '82 and all of '83 and '84.

Q. Okay. Dan, are you familiar with the Jamie Charboneau case?

A. I certainly am.

Q. And how is it that you're familiar with that case?

A. I was the prosecuting attorney for Jerome County representing the State of Idaho in State of Idaho versus Jamie Charboneau; three, three different counts: Grand theft, rape, and first-degree murder.

Q. Okay. And I understand that the Attorney General's office was appointed to prosecute that action sometime during the proceedings; is that right?

A. Okay. It became obvious that the trial was not going to take place before I left office because I did not rerun for the prosecutor's position; and when that decision was made, that's when the Attorney General's office came in, yes.

Q. All right. Dan, did you ever have any private conversations with Golden Bennett concerning this case?

A. Yes.

Q. Okay. And when did you have these particular conversations?

A. Well, we had various conversations ranging from, from when he was first appointed; but I talked with him regularly before the preliminary hearing, before Mr. Charboneau was bound over to District Court, conversations on a regular basis.

. . . .

Q. Dan, you said there was one particular theory that he elicited to you in a conversation. Where did it take place?

A. Well, again bits and pieces, even in the hallway, but primarily I think in my office and, the prosecutor's office.

Q. Who was present during that particular conversation?

A. Well, I'm almost certain [defense investigator] Mr. Coakley was and Golden Bennett and myself.

Q. Okay. Could you relate to the court what the substance of that conversation was?

A. Well, basically, it was: You've got to bring in the .22 revolver pistol. You have to change the focus of your investigation and take the heat off of my client and place it on Tiffy, Tiffnie Arbaugh, because she's the one that shot the, made the final shot into her mother.

And my question was, well, how do you know all this? And frankly, I expected him to say that his client told him so, and in fact in some of the earlier suggestions as to how this crime had happened, he had gotten those from Mr. Charboneau. But this particular instance dealt with the fact that he had contacted his niece or cousin or something like that in California, that she conducted a seance and that she had communicated with Marilyn Arbaugh, the victim in the case, and that Marilyn had indicated how much she loved Jamie Charboneau, and that even though she was upset that her daughter had shot the final shot, she also forgave her because she knew how much she had hurt her, et cetera, et cetera, et cetera. And it was kind of a long drawn-out statement as to what this dead person had said through the seance, trying to convey her love to Jamie Charboneau, and forgiving of her daughter for shooting her.

Tr., Vol. 23, Post-conviction Relief Hearing, 57-62.

Mr. Bennett's secretary also testified. She stated that much of the pre-trial defense was concentrated on summoning assistance from the world of the supernatural. Her testimony on post-conviction proceedings was corroborative of the prosecutors.

Q. Okay. Are you familiar with a Jamie Charboneau case?

A. Yes.

Q. How is it that you're familiar with that?

A. Well, I worked for Golden for about four months in '84 and the first part of '85 when he was defending Jamie.

Q. Okay. Golden was representing Jamie during this entire time; is that correct?

A. Yes.

Q. Did you ever witness any conversations between Golden Bennett and his investigator James Coakley?

A. Yes.

Q. Okay. And where were these conversations? Where did they take place?

A. In Golden's office.

Q. All right. And who was present at the time?

A. Golden, Jim Coakley, Golden's daughter-in-law Jean, myself, Peggy, I can't tell you who was there every, you know, for every conversation, but people that work in the office.

Q. Okay. When did these conversations take place?

A. Well, they'd -- the whole time that I was working there on several occasions.

Q. Were they frequent, all the time? Were they now and then? What were they?

A. They were frequent. That was the case that, Golden's big case he was working on when I was there. They talked about it a lot.

Q. Okay. And would you relate to the Court the substance of these conversations?

A. Well, they were planning their strategy, what, how they were going to try to help Jamie with the information that Jim Coakley was furnishing Golden.

Q. And what was that?

A. Well, he was trying to contact the deceased's spirit on several occasions. He said that it was an unfriendly spirit. And then one day we came to work and he said that he'd contacted her the night before and as far as I know that's what Golden was basing his information on.

Q. Okay. Did they talk about clairvoyants during this period of time?

A. Yes.

Q. Often?

A. Yes.

Q. Okay. And did you hear Golden Bennett talk about clairvoyants?

A. Yes. Not as much as Jim did, but, yes.

Tr., Vol. 23, Post-conviction Relief Hearing, 163-65.

Defense counsel was preoccupied with using the results of a seance in preference to utilizing the traditional measures relied upon by defense lawyers: fact investigation coupled with legal research. Moreover, rather than independent investigation of the circumstances of the case, defense counsel approached the Attorney General's office in an attempt to persuade the State to investigate. As defense counsel explained in his deposition:

> My purpose in going to Boise was to convince the attorney general's office that an independent investigation was needed, and that it wouldn't be done properly in Jerome County, and I had

> complete faith in the attorney general's office, I still do, and it just seemed like the appropriate way to go at the time.

Deposition of Golden Bennett at 27 (emphasis added). Thus, instead of accepting the responsibility of embarking on his own factual investigation, defense counsel relied upon the prosecutorial arm of the State to do it for him. The lack of investigation and preparation for trial is also shown by the testimony of Randy Stoker, the attorney who ultimately, and on short notice, represented Charboneau at trial:

> I picked up that case in a posture where there had been virtually no investigation done, there were no readable, credible witness statements in the file. There were no jury instructions prepared. Jaimi had never been examined by a psychiatrist or psychologist. There was no ballistics experts hired. There were no pathological testimony from a defense standpoint. There was nothing in terms of what I would consider assistance to me at that point in the file that I was handed from his previous counsel.

Vol. II, Post-conviction Relief Hearing at 27 (emphasis added).

The American Bar Association's "Defense Function" upon which the majority heavily relies, provides that:

> It is the duty of the lawyer to conduct prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

Standard 4-4.1 (1982) (emphasis added). While the standard makes clear that the defense attorney should try to secure information and evidence through discovery, an independent investigation is also required. Otherwise, if it be true that the prosecution can properly be relied upon to do all of the investigative tasks for an accused, the adversarial nature of our criminal system of justice breaks down. As observed in *Strickland*, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686, 104 S. Ct. at 2064 (emphasis added).

In *Kimmelman v. Morrison*, 106 S. Ct. 2574 (1986), the Supreme Court was asked whether a defense counsel's failure to file a timely suppression motion, due to a lack of investigation, constitutes ineffective assistance of counsel. The Court held that it did:

> The justifications Morrison's attorney offered for his omission betray a startling ignorance of the law -- or a weak attempt to shift blame for inadequate preparation. '[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' [citations] Respondent's lawyer neither investigated, nor made a reasonable decision to investigate, the State's case through discovery. Such a complete lack of pretrial preparation puts at risk both the defendant's right to an "'ample opportunity to meet the case of the prosecution,'" [citations] and the reliability of the adversarial testing process.

106 S. Ct. at 2588-89 (citations omitted) (emphasis added).

Defense counsel not only failed to investigate, but he also subjected his client to examination by the State for no legally recognizable purpose. Moreover, at defense counsel's invitation the State was allowed to interrogate Charboneau for two hours, without defense counsel being present. The scope of the questioning was not limited and Charboneau was left to fend for himself. The majority readily and properly concedes that "Charboneau divulged a great many more particulars concerning the alleged kidnapping, theft and murder." Slip Op. at 6.

Defense counsel also called Charboneau to the stand to testify at the preliminary hearing, thereby waiving the constitutional right to remain silent. The majority says of this strange affair, "[w]hile it may not have been the game plan that other attorneys would have followed, we may not second guess counsel's strategic and tactical choices." Slip Op. at 12. The majority is only half right in stating that premise. True, unsuccessful but reasonable tactical decisions should not be the basis for finding ineffective assistance of counsel, but only so long as the strategic choices have some plausible basis in the record. As this Court's opinion in *Aragon v. State (Aragon II)*, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988) stated: "When counsel's trial strategy decisions are made upon the basis of inadequate preparation, ignorance of the applicable law, or other shortcomings capable

of objective evaluation, the defendant may very well have been denied effective assistance of counsel" (quoting *State v. Tucker*, 97 Idaho 4, 10, 539 P.2d 556, 562 (1975) (emphasis added in *Aragon* II)).

This case stands in stark contrast to *Aragon II*, where the ineffective assistance contention lay in failing to call witnesses to bolster the accused's character. The decision not to call character witnesses was reasonable, so it was held, because counsel, associate counsel and an investigator had interviewed Aragon's family and people that knew him; thereafter, counsel made the informed decision that the defense would not be helped by calling such persons. 114 P.2d at 763, 760 P.2d at 1179. Unlike *Aragon II*, however, defense counsel in the instant case engaged in no independent factual investigation upon which to base principled strategic decisions.

The majority concludes that defense counsel's performance was effective because nothing contained in the American Bar Association's standards prohibits counsel from placing the accused on the stand as a witness at the preliminary hearing. However, as the High Court made clear in *Strickland*:

> Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ('The Defense Function'), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

104 S. Ct. at 2065 (emphasis added). Indeed, a case may arise where it is in the defendant's interest to testify at the preliminary hearing. However, in the case at bar no reason for calling Charboneau to testify has surfaced, other than as it might somehow induce the Attorney General to investigate the case with the thought in mind that the murderer was not Charboneau.

Subjecting the unrepresented defendant to the State's questioning on two occasions was not enough. Defense counsel also put Charboneau on the stand when the Motion to

Dismiss was heard. Defense counsel, however, was certain that the Motion to Dismiss would not be granted. His purpose was only to embarrass the prosecution into conducting a more thorough investigation along the aforesaid avenues. However, anything Charboneau might say in such circumstance later could then be used to impeach him at trial if he were to testify. One expert witness, practicing attorney and formerly a judge, Lloyd Webb, stated that defense counsel's decision to place Charboneau on the stand in order to embarrass the prosecution was: "Nonsense. You don't embarrass prosecutors into making proper investigations that way. This is not a judgment call. This is just plain incompetency. I can't understand Mr. Bennett and why he did that." Vol. I, Post-conviction Hearing at 56 (emphasis added).

Thus, Charboneau was denied effective assistance by the defense counsel's: (a) placing unbridled reliance on the report given to him as to the results of the seance in formulating the "defense" which he conducted; (b) failure to investigate the facts of the case, proceed with discovery, and generally make the necessary preparations for trial -- as against merely relying on the prosection to investigate the case along the lines defense counsel outlined, thereby undermining the adversarial nature of the criminal justice system; and (c) allowing the state the unfettered opportunity to interrogate Charboneau without counsel being present; and (d) calling Charboneau as a witness at the preliminary hearing and hearing on the motion to dismiss absent any plausible basis for so doing.

B. FAILURE TO STRIKE EVIDENCE OF GRAND THEFT AND KIDNAPPING CHARGES

The majority holds that evidence of the felony charges of kidnapping and grand theft was properly not stricken, even though both charges were dismissed at the close of the prosecution's case for lack of jurisdiction. It is said that such evidence shows Charboneau's motive or intent under I.R.E. 404(b). The majority opinion supplies the trial court's reasoning for not granting the motion: "The court denied the motion on the ground that the evidence would have been admissible in the murder case in any event." Majority Slip Op., p.7. On page 24 of the Majority Slip Opinion is added to the foregoing this sentence: "This thing occurred over a period of some ten or twelve days and I think the

jury needs the benefit of all that testimony in order to properly arrive at a decision, whichever way they decide."

The majority then disposes of this extremely crucial evidence by recounting the facts of an earlier (1979) case which -- wholly unlike this case -- was in large part based on circumstantial evidence. A burned torso, minus head and legs, was discovered, and authorities made a tentative identification that the corpse was the remains of one Ron Needs. This led to the arrest of Sally Needs, and thereafter a trial on a charge of murder. The prosecution proved the identity of the corpse to the satisfaction of the jury by circumstantial evidence.

Sally Needs was convicted based on the testimony of a witness who in mid-June saw Sally Needs arm herself with two butcher knives, and brandish them at Ron Needs, who disarmed her. The witness testified that Mrs. Needs threatened that she was going to get him -- also then throwing gasoline on him. On appeal Sally Needs contended that the trial court erred in allowing in the testimony of the assault, which was established as having been two weeks prior to Ron Need's death. This Court held that it was not error to allow the testimony, the rationale being that "[s]uch evidence is clearly relevant to her motive and intent as well as to shed considerable light on her mental attitude towards Ron Needs." 99 Idaho 883, 893, 591 P.2d 130, 140 (1979). Although that language is somewhat overbroad, it met with my approval then, and continues to. That was an unusual set of circumstances.

Here we have a homicide which took place with witnesses in the area. What I remember best in the *Needs* case is the statement that "Idaho courts do follow the general rule that evidence of other unrelated criminal activity is inadmissible at trial to show criminal propensity on the part of the accused." 99 Idaho 883, 892, 591 P.2d 130, 139 (1979) (emphasis added).

Here, the two charges of kidnapping and a grand theft, neither related to the homicide, were both alleged to have taken place when Charboneau on June 21, 1984, entered his former wife's car and drove off with her and the car allegedly keeping her captive until she escaped. The car was alleged to be valued at over $150.00.

Those two unrelated charges were not filed in connection with the July 1 homicide charge which was later filed on July 2, 1984. It was defense counsel who conceived that strategic "tactic" of promoting a single trial of all three charges. As pointed out in Mr. Fuller's opening brief in this Court, the district court attempted to dissuade defense counsel from such foolishness:

> [T]he Court acknowledged that it was improper to consolidate the three criminal trials and that Jaimi was going to be prejudiced. He stated:
>
> > And I might further add, if Mr. Charboneau will recall, I did my level best and even fought with counsel to separate these trials. I didn't want them all held together; I wanted to separate the one from the other. And Mr. Charboneau and counsel wanted it held together. So that's one of the problems we run into by holding it together. Objection overruled.
>
> Trial Tr., Vol. II, p. 375, L. 4-11 (emphasis added).

Upon the State resting its case, Mr. Stoker moved to dismiss the kidnapping and grand theft charges on jurisdictional grounds that had been discussed early in the trial with the trial court judge. Both charges were dismissed because jurisdiction was wholly lacking. Then Mr. Stoker attempted to strike the evidence concerning the issues involved in the grand theft and kidnapping counts that he had tried to exclude earlier. In response to Mr. Stoker's Motion to Strike, the Court stated:

> There is no evidence whatsoever that all or any part of the crime occurred in Jerome County, and that would -- jury would have to speculate as to that, it would be pure speculation. That's why I'm taking it away from them . . . I am concerned about the defense' motion to instruct the jury. (Motion to Strike) I think that I would have to so instruct them, because -- and here is another part -- this is the thing that bothered me about this case a long time ago, is when the defense was always wanting to join all of these cases for trial. I turned down that Motion I don't know on how many occasions. Finally, at the last session when you were together where the state joined and the defense joined, I allowed it to go through. It bothers me that the jury does have in their minds all of the other evidence. . . and I don't know if I can cure that with an instruction.

Trial Tr., Vol 6, p. 1361, LL. 20-25, p. 1352, LL. 1-15.

. . . .

> When one considers all of the facts, the bottom line is that the defendant was prejudiced and could have received a verdict other than first degree murder. In fact, there was an extremely good possibility that the defendant could have been convicted of voluntary manslaughter.

Appellant's Brief at 247-50 (emphasis added).

C. JURY DETERMINATION OF LIFE OR DEATH

The majority continues to repudiate the mandate of art. 1, § 7 of the Idaho Constitution, thereby robbing the capital defendant of the right to a jury trial. The life or death decision had always been within the exclusive province of the jury in Idaho, until the legislature in 1977 passed the current version of I.C. § 18-4004, drafted and sponsored by the Attorney General. The steady stream of dissents from Justice Huntley and later myself beginning with *State v. Creech*, 105 Idaho 363, 670 P.2d 463 (1983), have failed to persuade a majority of this Court, or the legislature, that the Idaho Constitution requires jury participation in capital sentencing.

Today the majority takes on bigger game and now rejects the sound reasoning of the *en banc* Ninth Circuit Court of Appeals in *Adamson v. Ricketts*, ___ F.2d ___ (filed December 22, 1988), holding that the Arizona capital sentencing scheme -- remarkably similar to Idaho's -- violates the sixth amendment right to a jury determination of each element of the offense charged.

In *Adamson* the Ninth Circuit stated:

> Under Arizona's revised code, all murder is not capital murder. Since 1973, Arizona has required that before a death sentence may be imposed the trial judge must find beyond a reasonable doubt that at least one statutory aggravating circumstance exists. While Arizona has formally subdivided murder into at least four categories -- first degree murder, second degree murder, manslaughter and negligent homicide -- it appears that aggravating circumstances in fact operate to create an additional category of murder. While the statute's nomenclature ('aggravating circumstances') suggests they are mere factors guiding the judge in his or her determination of the appro-

> priate penalty, all other indicators confirm that aggravating circumstances are additional elements necessary for a finding that a defendant is guilty of the distinctive offense of capital murder. Finding aggravating circumstances results in the only crime in Arizona for which a defendant may receive a death sentence.

___ F.2d at ___ (filed December 22, 1988) (emphasis and parentheses in original; footnotes omitted). Like Arizona's aggravating circumstances, Idaho's capital sentencing statute, I.C. § 19-2515, constitutes elements of the crime of capital murder. Simply put, an Idaho citizen cannot be put to death unless the evidence establishes an aggravating circumstance, the *sine qua non* of capital murder. Accordingly, when the presence of such an element is determined by a trial judge -- and not a jury -- the right to a jury trial guaranteed by the Idaho and federal constitutions is violated.

A majority of the Court, however, shuns *Adamson* on the basis of the Supreme Court's decision in *Spaziano v. Florida*, 104 S. Ct. 3154 (1984), which held that judge-sentencing in capital cases does not violate the eighth amendment prohibition against cruel and unusual punishment. However, in *Adamson* the Ninth Circuit convincingly demonstrates that the

> [Supreme] Court's examination in *Spaziano* was limited to the constitutionality of judicial 'sentencing' and evaluation of 'the appropriate punishment to be imposed.' 468 U.S. at 458-59. The Court never addressed a claim of judicial fact-finding as to an element of the offense. Thus the Court never reached the particular contention Adamson raised: that Arizona's capital sentencing statute requires the judge to determine elements of the offense charged, thereby taking this factual element out of the jury's hands in violation of the Sixth Amendment. Sentencing, or the ultimate determination of an appropriate penalty, involves the weighing of factors. Such weighing is completely distinct from threshold findings of whether requisite elements even exist from which the trier-of-fact draws conclusions on guilt or innocence.
>
> Thus, *Spaziano* is not controlling in this case, as it left untouched the question of the right to a jury trial where the aggravating circumstances of a state's death penalty statute are elements of a capital offense.

___ F.2d ___ (footnote omitted) (emphasis added). The ultimate outcome is, of course, up to the Supreme Court of the United States, but whatever it may be, that Court surely will address the issue as one of first impression, and not "inherently" mandated by *Spaziano* as the majority of this Court today erroneously concludes.

D. THE HEARSAY LETTER FROM THE VICTIM'S FATHER

The majority holds that the letter written by the victim's father and admitted at the penalty phase of the trial was inadmissible hearsay. With that much I agree. However, a majority of this Court adheres to the view that hearsay contained in a presentence investigation report can properly be considered by a trial judge when weighing aggravating against mitigating circumstances.

Idaho Code § 19-2516 provides:

> **Inquiry into circumstances -- Examination of witnesses.** -- The circumstances must be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section.

(Emphasis added.) I remain convinced that the mandate of the legislature expressed in I.C. § 19-2516 and that of the founding fathers expressed in the due process clauses of the state and federal constitutions prohibits the admission of presentence investigation reports obtained by hearsay and containing hearsay. As stated on an earlier occasion:

> [T]he Court simply cannot in any show of conscience continue to let capital sentencing be hinged on unsworn statements and other forms of hearsay. It is now clear that a capital case involves two trials. The first is to try the issue of the accused's guilt. If convicted, the second is to try the issue of the circumstances of his crime and the facets of his character. Common sense dictates that the second trial for his life is the defendant's more important trial. Can it be then that in Idaho we have a rule that while due process obtains at the guilt trial, anything goes at the second trial which determines the issue of life and death? Until recently, I had thought that removing

> the element of due process from the second trial was such a monstrous proposition as to be undeserving of discussion or comment.

State v. Sivak, 105 Idaho 900, 920-21, 647 P.2d 396, 416-17 (1983) (Bistline, J. dissenting).

It seems exceptionally clear to me that unless the system has broken down to the point where it is permissible to allow a jury -- as the sentencing authority -- to have placed before it anything and everything which a presentence investigator comes across or can stir up, then, and only then, should a district judge as sentencing authority likewise be so influenced.

E. VAGUENESS OF AGGRAVATING CIRCUMSTANCES

The cruel and unusual punishment prohibitions of the state and federal constitutions require that the sentencer's discretion in imposing the death penalty limited to "minimiz[e] the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 108 S. Ct. 1853 (1988). The Supreme Court has held that the statutory aggravating circumstances, such as those in I.C. § 19-2515, must be given a limiting construction if the state is to meet its constitutional obligation "to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 1764, 64 L. Ed.2d 398, 406 (1980).

Idaho Code § 19-2515(g) provides:

> The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed.
>
> . . . .
>
> (5) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.
>
> (6) By the murder or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.

(Emphasis added.) In regard to the (g)(5) aggravating circumstance, the majority concludes that the following limiting construction passes constitutional muster:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile;

> and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Slip Op. at 38 (quoting *State v. Osborn*, 102 Idaho 405, 418, 631 P.2d 187, 200 (1981) (emphasis in original).[11]

The limiting construction given to the (g)(5) aggravating circumstance by *Osborn* and reaffirmed today by the majority, is wholly insufficient to guide the sentencer's discretion in limiting the application of the death penalty consistent with constitutional mandates. Terms beget terms. What is the "norm" of capital felonies? Who sets this "norm"? Indeed, all first degree murders involve the unlawful killing of another with malice aforethought. What sets this particular murder apart -- not from other crimes -- but from the "norm" of first degree murder? In a domestic dispute husband kills wife with a gun. Do all such murders now warrant execution? If so, it can hardly be said discretion is limited.[12]

Also, the *Osborn* "limiting" definition of the (g)(5) circumstance provides that the murder must be "unnecessarily torturous to the victim." Clearly, however, this definition is simply duplicative of the (g)(7) circumstance which subjects defendants to death for murder by torture.[13] In the final analysis, all first degree murders are "especially heinous,

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[11] The *Osborn* majority adopted this limiting construction to a very similar aggravating circumstance of the Florida Supreme Court in *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. den.*, 416 U.S. 943, 94 S. Ct. 1951, 40 L. Ed.2d 295 (1974).

[12] The *Adamson* court, reviewing Arizona cases applying similar "heinous and/or depraved" language convincingly demonstrated that the words themselves are empty vessels capable of being filled by a court as it chooses with any facts at hand. *Adamson*, Slip Op. at 15676, ___ F.2d at ___.

[13] Idaho Code § 19-2515(g)(7) provides: "The murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b)(c)(d)(e) or (f), and it was accompanied with the specific intent to cause the death of a human being."

atrocious or cruel, manifesting exceptional depravity." Nothing in the majority's interpretation restricts the broad brush with which the subsection is drawn.

The (g)(6) aggravating circumstance, which requires that the defendant exhibit "utter disregard for human life," suffers from similar infirmities. Today the majority reaffirms the "limiting" construction enunciated in Osborn:

> We conclude instead that the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer.

Slip Op. at 39 (emphasis added) (quoting *Osborn*, 102 Idaho at 419, 631 P.2d at 201). What first degree murderer fails to show "callous disregard for human life"? I suppose this would be the "pitiful" slayer, who, prior to delivering the fatal blow, tells the victim: "Excuse me, pardon me, I know it's inconvenient, but I must now take your life."

Furthermore, the (g)(5) and (6) aggravating circumstances are duplicative. Every murderer who exhibits "utter disregard for human life" commits a crime which is "especially heinous, atrocious or cruel manifesting exceptional depravity." Today, however, the majority in *State v. Fain* (1989 Opinion No. ___), concludes that the aggravating factors describe two "quite different kinds of culpability." The majority states:

> The particularly cold-blooded killer need not act sadistically or in a particularly outrageous fashion in order to commit a killing with utter disregard for human life. One who commits a crime in an especially heinous way is punished for the heinousness of his crime, not because he acted with utter disregard for human life, although it may be expected that most especially heinous, atrocious or cruel murders will have been committed with utter disregard for human life.

Fain, Slip Op. at 32 (emphasis added).

Thus, according to the majority, a "cold-blooded killer need not" act in an "outrageous fashion" to commit a murder "with utter disregard for human life." I cannot fathom a first degree murder which is not carried out in an "outrageous fashion." Every premeditated murder is outrageous.

Idaho Code § 18-4003(a) is the murder by torture statute.

The (g)(5) and (6) subsections are nothing more than kitchen sink aggravating circumstances which enable the state to make every first degree murderer not just a candidate for, but an actual recipient of, the harshest and most final of all criminal penalties. As a result, the mandate to narrow the class of death-eligible murders is abandoned.

COPY

THE STATE OF IDAHO
SUPREME COURT
BOISE 83720

BYRON J. JOHNSON
JUSTICE

April 18, 1989

Mr. Brian L. Johnson
Assistant Managing Editor
West Publishing Company
P.O. Box 64526
St. Paul, MN 55164-0526

RE: STATE v. CHARBONEAU
1989 Slip Opinion No. 44
Filed: 4/4/89
Idaho Supreme Court Nos. 16339 and 16741

Dear Mr. Johnson:

Please correct the following typographical errors in the above-captioned slip opinion:

Page 7 -- 5th line from the top, 1984 should be corrected to read 1985.

Page 42 -- 13th line from the top, reads: "We hold that the trial court may not sentence the defendant to death unless the trial court finds that all the mitigating circumstances outweigh the gravity of each of the aggravating circumstances found and make imposition of death unjust."

This should read: "We hold that the trial court may sentence the defendant to death, only if the trial court finds that all the mitigating circumstances do not outweigh the gravity of each of the aggravating circumstances found and make imposition of death unjust."

Thank you for your attention to this matter.

Sincerely,

Byron J. Johnson

BYRON J. JOHNSON
Justice

cc: (fax) Judges Becker, Haman, Michaud & Woodland
/m

Idaho Criminal Rule 32

Rule 32. Standards and procedures governing presentence investigations and reports. - The following standards and procedures shall govern presentence investigations and reports in the Idaho courts:

(a) When presentence investigations are to be ordered. The trial judge need not require a presentence investigation report in every criminal case. The ordering of such a report is within the discretion of the court. With respect to felony convictions, if the trial court does not require a presentence investigation and report, the record must show affirmatively why such an investigation was not ordered.

(b) Contents of a presentence report. A trial judge may request a record check and other background information concerning the defendant prior to sentence without conducting a full presentence investigation of the defendant. However, whenever a full presentence report is ordered, it shall contain the following elements:

(1) The description of the situation surrounding the criminal activity with which the defendant has been charged, including the defendant's version of the criminal act and his explanation for the act, the arresting officer's version or report of the offense, where available, and the victim's version, where relevant to the sentencing decision.

(2) Any prior criminal record of the defendant.

(3) The defendant's social history, including family relationships, marital status, age, interests and activities.

(4) The defendant's educational background.

(5) The defendant's employment status and capabilities.

(6) Residence history of the defendant.

(7) Financial status of defendant.

(8) Health of the defendant.

(9) The defendant's sense of values and outlook on life in general.

(10) The presentence investigator's analysis of the defendant's condition. That analysis of the defendant's condition contained in the presentence report should include a complete summary of the presentence investigator's view of the psychological factors surrounding the commission of the crime or regarding the defendant individually which the investigator discovers. Where appropriate, the analysis should also include a specific recommendation regarding a psychological examination and a plan of rehabilitation.

(c) Recommendations concerning sentence. The presentence report may recommend

incarceration but it should not contain specific recommendations concerning the length of incarceration, the imposition of a fine or the amount of a fine, or the length of probation or other matters which are within the province of the court. Provided, however, the presentence report may comment generally on the probability of the defendant's successfully completing the term of probation or the defendant's financial ability to pay a fine imposed by the court.

(d) Psychological evaluations. The presentence investigator may recommend a psychological evaluation, but the decision as to whether to order a psychological evaluation is to be made by the sentencing judge.

(e) Information which may be included in the presentence report. (1) Content. The presentence report may include information of a hearsay nature where the presentence investigator believes that the information is reliable, and the court may consider such information. In the trial judge's discretion, the judge may consider material contained in the presentence report which would have been inadmissible under the rules of evidence applicable at a trial. However, while not all information in a presentence report need be in the form of sworn testimony and be admissible in trial, conjecture and speculation should not be included in the presentence report.

(2) Previous charges against defendant. It is permissible for the sentencing judge to consider information in a presentence report regarding a previous charge against the defendant which been dismised after a successful probation period.

(f) Additional report may be ordered. The sentencing judge may order an additional investigation of the case if he deems it necessary and use such results in considering the disposition.

(g) Access to presentence report. (1) Disclosure of report, exceptions. Full disclosure of the contents of the presentence report shall be made to the defendant, his counsel, and the prosecuting attorney prior to any hearing on the sentence except as hereinafter provided. The defendant and his attorney shall be given a full opportunity to examine the presentence investigation report so that, if the defendant desires, he may explain and defend adverse matters therein. The defendant shall be afforded a full opportunity to present favorable evidence in his behalf during the proceeding involving the determination of sentence. Provided, however, the trial court may withhold from disclosure parts of the presentence report which contain diagnostic opinion which might seriously disrupt a program of rehabilitation, or information which in the

court's discretion may prove harmful to an individual not a party in the proceeding.
(2) Explanation of non-disclosure. Where the trial court chooses to withhold from disclosure to the defendant information in the presentence report, the court must state for the record the reasons for its action, inform the defendant and his attorney that information has not been disclosed, and explain the general nature of the information being withheld. Further, if requested, the defendant's attorney, if the defendant is represented by counsel, shall be allowed to review any information in the presentence report which is so withheld from disclosure so as to allow the attorney a full opportunity to explain and rebut the information contained therein.
(3) Time of disclosure. Disclosure of the information contained in the presentence report under the conditions mentioned above shall be made at a sufficient time prior to the imposition of sentence so as to afford a reasonable opportunity for the defendant or his attorney to verify or rebut any information contained in the report. Reasonable requests for a continuance of the sentence proceeding, when based on lack of sufficient time to examine or offer rebuttal to information contained in the presentence report, may be granted by the sentencing judge.
(h) Disclosure of presentence reports.
(1) Custody of presentence report. Any presentence report shall be available for the purpose of assisting a sentencing court. After use in the sentencing procedure, the presentence report shall be sealed by court order, and thereafter cannot be opened without a court order authorizing release of the report or parts thereof to a specific agency or individual. The presentence investigator's own copy of the presentence report similarly is restricted from use by all but authorized court personnel. Neither the defendant, his counsel, the prosecuting attorney nor any person authorized by the sentencing court to receive a copy of the presentence report shall release to any other person or agency the report itself or any information contained therein. Any violation of this rule shall be deemed contempt of court and subject to appropriate sanctions.
(2) Availability of presentence report to third parties. With the permission of the sentencing judge, the presentence report may be available to persons or agencies having a legitimate professional interest in the information likely to be contained therein, if it appears that such availability will further the plan or rehabilitation of the defendant or further the interests of public protection, and that appropriate safeguards for the confidentiality of information

contained in the presentence report will be provided by the persons or agencies receiving such information. Such persons or agencies may include a physician or psychiatrist appointed to assist the court in sentencing, an examining facility, a correctional institution, a probation or parole department, or the supervisors of a public or private rehabilitation program.

(3) Availability of presentence report on appeal. The report shall be available for review in courts of appeal when relevant to an issue on which an appeal has been taken.

LETTER TO JUDGE BECKER FROM VICTIM'S FATHER
JIM ARBAUGH

October 30, 1985

The Honorable Judge Phillip Becker
712 3 Avenue West
Gooding, Idaho 83330

Your Honor:

Perhaps I shouldn't be writing this letter and I probably wouldn't be but you stated that you had been getting letters and I don't believe any of them were from our family. I believe you should hear our side.

The Charboneau family has told all kind of lies to the court and to the newspapers. We even received two letters of extortion from them. We were advised by the Jerome county prosecutor not to respond to any of them because the Charboneaus and their attorney Mr. Bennett were trying to create enough publicity to get the trial moved out of Jerome county. So we have kept quiet for about fifteen months.

About two months after Marilyn met Charboneau he took complete charge of her life, by beating and abusing her and threatening the rest of her family. He told her, repeatedly, he would completely destroy her family.

The first person to warn Marilyn not to become involved with Charboneau was the man that his mother was living with at the time. His first name is Carlos and he owned the Falls Creek bar.

Charboneau told Marilyn if she would marry him he wouldn't beat her because he would know she was completely his. It didn't work it only got worse. I believe he thought it was no one's business what he did to her. He told her many times that he would kill Tiffie or her Dad. We couldn't understand why she couldn't get away from him. At one time Marilyn said to her Mother, 'What would my life be like if I didn't do what he says and he kills Tiffie and Dad. I didn't think he would kIll either of us, but I was wrong. She knew him better than anyone else and took all those beatings to protect us. Marilyn never told us much about the beatings except when it was so bad she could not hide the swelling and bruises.

Charboneau said they couldn't get along when they were around Marilyn's family. He beat her up in Mountain Home, Shoshone, Owyhee county and Montana. We were not around at these times but we now know they happened.

I talked to Marilyn about the shooting incident in Lincoln county. She told me that Charboneau had informed her the night before the incident that she

couldn't stop him from doing anything he wanted to Tira. The argument started the next morning when he got in bed with Tira. Marily told me the only thing

she wanted was to get Charboneau to the sheriff and save her and Tiffie's life. Charboneau told them he was going after a bigger gun and kill Marilyn, Tiffie and the horses, and take Tira with him. Charboneau had told Tira that the only reason he kept coming back was Tira and their dog.

Attorney Doug Rose from Lincoln county completely changed his story since he talked to me following this incident. He had informed me he believed Charboneau was guilty of all the charges filed against him and he believed he was guilty of rape in Lincoln county. However, he stated that he couldn't prove that because he couldn't use Marilyn's statement because she was dead. He also told me when he dropped charges against Marilyn, after Charboneau went back to Marilyn's home and tried to kill her (2/84) that he knew Marilyn had shot Charboneau in self-defense.

Charboneau harassed us for almost two years. He would call us at any time of the night even though we consistently told him not to call our home. Yet he persisted.

I have heard Marilyn order him to stay away from her family and I have heard her beg him, please stay away. She gave him money to stop his harassment. I told Marilyn she shouldn't be paying him to leave and she replied that she would give him any amount of money (if she had it) if he would leave and not return. One time he told her he would leave if she would buy him a bus ticket. She bought the ticket and he cashed it back in, went to the bar and was back the next morning.

Marilyn told me June 22, 1984 that she knew if she hadn't escaped that day Charboneau would have killed her. She had been beaten severely and a lot of her hair was pulled out. She told us he choked her until she passed out. When she regained consciousness she was in the sage brush near Richfield and she believed he was either going to leave her there or bury her there. Charboneau then drove through Shoshone, Gooding and Wendell to the Snake River canyon; torturing her the rest of the night and threatening to drive her off the canyon rim. When she escaped and got to a telephone she asked Marlene (her sister) to go to El Rancho 93 and pick up her daughters before she came after her because she was afraid that he would reach the girls first and harm them.

When Marilyn was on the ground dying and Charboneau was standing over her with a rifle, she didn't ask Tiffie to help--she asked her to leave because she knew Charboneau would kill her too.

Witnesses have said Marilyn carried a loaded gun in her purse all the time. Marilyn didn't carry a

purse. I have talked to my family and no-one saw her with a purse in more than two years. She carried a little blue wallet. After Charboneau took her car with her wallet, brief case and some clothes and burned the car she came home and got a small purse and used it until she was killed. If she had been carrying a gun it would have been in the car with her other possessions.

After Charboneau was placed in jail, he kept on harassing our family by telling lies; specifically that Tiffie killed her mother and threatening to demand exhumation of Marilyn's body.

Charboneau's family, Bennett and Stoker all knew there was no bullets in the body that he had not put there. The defense and defendant did this to harass and hurt the Arbaugh family.

The Charboneau's talked about how Marilyn cursed or cussed. I have been around my daughter almost all her life. She has worked with me, I have seen her trampled by a horse and loose an elk on a hunting trip but I have never heard Marilyn curse and she told me that she had not and did not "cuss".

Charboneau is the most criminally minded person I have ever known. Marilyn told me that she believed he only lived to hurt and destroy people. He had ten days to change his mind after he decided to kill Marilyn but his mind was made up. He was hiding in the barn for three days and he didn't change his mind. She walked past him in the barn and he shot her in the back several times; he could have changed his mind at this point but he didn't. He walked up to her, yelling at her, and shot her several more times in the chest.

The psychologist said Charboneau might be changed in ten to 14 years. He also stated that he would need a one-on-one type of therapy. In other words, according to the psychologist, he needs someone to tell him what is right and what he must do. The state of Idaho does not provide that kind of therapy nor does any other state that I know of. I do not believe that anyone who knows Charboneau feels that he will ever change. My family feels tht if he ever got out of prison that we would be going through the same thing again.

He tried to get Tira to go to Nevada with him after Marilyn started divorce procedings. He used the excuse they would buy a horse for Marilyn. He also testified that he helped Marilyn with the divorce papers. He did not help her. She had to get a law enforcement officer to go with her to serve the divorce paper on him.

Charboneau has no respect for law or any type of order. When he killed Marilyn he had orders from Sheriff Hall, Marilyn, and the man that runs El Rancho not to be there; but he was there.

Charboneau said, on the witness stand, that Marilyn owed bills all over for hay. The hay he was talking

about was hay that she was buying. He stole the hay and sold it to a Mr. Vickers. This can be confirmed by Bugs Moseley. Charboneau even tried to sell some hay to my son. After the divorce Charboneau told Marilyn he would pay all the bills and stay away from her if she would give him two of her horses. She gave him the horses and he paid $20.00 on a portion of a dental bill. To the best of our knowledge we paid all her outstanding bills following her death with the

exception of one hospital bill in Mountain home where she was treated after one of the beatings from Charboneau.

The Charboneau family have accused me of one of the worst crimes there is and this was almost brought out in the pre-sentence hearing before prosecutor Mark Haws objected and you sustained the objection. If this type of questioning continues, I should be allowed to put witnesses on the stand tht grew up with Marilyn who could verify the falsity of such statements.

My family and friends know these accusations are lies. The Charboneau family fabricated this story and they know it is a lie but it possible that an outsider might consider it valid. If something like this had happened I don't believe it is reasonable to think Marilyn would have told someone she had known only a few months and not have told people she had been close to all her life. Marilyn had two sisters eleven and thirteen years younger than she was. I believe she wold have warned them. I have taken care of my granddaughters (Marilyn's daughters since they were small and taken them places with me. I do not think it is reasonable to think any mother that had been violated or molested would expose her daughters to the same person that had molested her.

We didn't know that we would be involved in the pre-sentence investigation until it was time to have the report in. We were informed Thursday afternoon while I was on the job. My wife told me when I returned home that evening. I tried to contact the investigating officer on Friday but was unable to locate him until Saturday about noon. I thought every thing should be checked out but he told me that there was not time. I wanted his army record checked--to show why he was discharged; also his income tax records which would verify that he had not earned a great deal of money. I asked them to check with retired sheriff Taylor in Elmore county and a deputy sheriff in Elmore county but I was told there was no time. Special prosecutor Mark Haws asked me to check with a rancher in Montana. When I called him he was shocked about Marilyn's death but he was not surprised. He stated that he knew what Charboneau was like and how he treated Marilyn when she and Charboneau were there.

During the time that Charboneau was harassing Marilyn

and our family it seemed that he had money although he was not working. According to Marilyn he received money periodicly from some source in Montana. I can't prove this but I have good reason to believe he was being paid by someone in Montana to stay away while asking Marilyn for money to stay away from her.

The defense talked about the yo-yo relationship between Marilyn and Charboneau. Marilyn had no control over that. Since it seems that Marilyn had no help from the law he could come and force his way in.

I don't know what else we could have done to save Marilyn's life. The police wouldn't believe us or

Marilyn; they felt he was such a mellow little guy. Prosecutor Adamson told us there was nothing Marilyn could do as long as he was hitting her with his fist--it was a family affair. However, they were not married. The law could not intervene unless there was a body. Well, Your Honor, Marilyn became just a body because no-one would or could help her. When you are alive no-one wll listen and when you are dead your statements cannot be used.

I know that you are a very busy man but I hope that you take time to read this letter. Thank you.

Sincerely,

Jim Arbaugh

(3)

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-151

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

THE STATE OF IDAHO,

Petitioner,

-vs-

JAIMI DEAN CHARBONERU,

Respondent,

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF IDAHO

BRIEF OF THE STATES OF ARIZONA, INDIANA, MISSISSIPPI, MONTANA, AND NEBRASKA AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division Division

CRANE McCLENNEN
Assistant Chief Counsel
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602)255-4686
(Attorney of Record)
Attorneys for Amici Curiae

LINLEY E. PEARSON
Attorney General of Indiana
219 State Hourse
Indianapolis, Indiana 46204

MICHAEL C. MOORE
Attorney General of Mississippi
P.O. Box 220
Jackson, Mississippi 39205

MARC RACICOT
Attorney General of Montana
215 North Sanders
Helena, Montana 59620

ROBERT M. SPIRE
Attorney General of Nebraska
2115 State Capital
Lincoln, Nebraska 68509

Questions Presented

1. When the sentencing is to be conducted by a judge rather than a jury, and when there is present evidence that is not relevant pursuant to Booth v. Maryland, but the trial court has stated that it has endeavored to avoid anything that might be hearsay, not pertinent, or not supported by the evidence, is the presence of this evidence at the sentencing a denial of due process and does it result in a sentencing proceeding that violates the Eighth Amendment's prohibition against cruel and unusual punishment.

2. Does the Sixth Amendment prohibit the use of hearsay evidence at the sentencing phase, and if so, is the admission of hearsay evidence subject to harmless error analysis.

3. Does the Eighth Amendment require that the sentencing authority balance all of the mitigating circumstances against each one of the aggravating circumstances.

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INTEREST OF AMICI CURIAE

The States of Arizona, Montana, and Nebraska, like the State of Idaho, provide in a capital case that the trial court shall make the factual finding whether aggravating and mitigating circumstances exist, and shall then weigh the aggravating and mitigating circumstances and determine the appropriate sentence; the jurors are therefore not involved at all in the sentencing process. The State of Indiana provides for the jurors to give an advisory verdict, but the trial court ultimately determines the sentence. Accordingly, these states have an interest in the first issue presented in the petition for writ of certiorari, since it affects all of the states that have sentencing done by the trial court rather than the jurors.

The States of Arizona, Mississippi, Montana, and Nebraska provide that any information relevant to mitigation may be presented by either the prosecution or the defense, without regard to the rules governing admissibility of evidence at the trial. Accordingly, these states have an interest in the second issue presented in the petition for writ of certiorari, since it affects all of the states that allow the introduction of hearsay evidence.

The States of Arizona, Indiana, Mississippi, Montana, and Nebraska provide that the sentencing authority shall weigh all of the aggravating circumstances against all of the mitigating circumstances, and then determine the proper sentence. Accordingly, these states have an interest in the third issue presented in the petition for writ of certiorari,

since it affects all of the states that require the sentencing authority to balance the aggravating circumstances against the mitigating circumstances.

SUMMARY OF ARGUMENTS

There is a presumption that a trial court, in making a determination, will consider only admissible evidence. Thus, when the information at a capital sentencing contains both admissible and inadmissible evidence, the presumption exists that the trial court considered only admissible evidence. In the present case, because the trial court stated that it had endeavored to avoid anything that might be hearsay, not pertinent, or not supported by the evidence, the presence of this information did not result in a denial of due process and did not result in a sentencing proceeding that violated the Eighth Amendment's prohibition against cruel and unusual punishment.

This Court has held that the sentencing authority should be aware of all relevant facts when imposing sentence, therefore either party should be allowed to introduce reliable hearsay evidence. Assuming that hearsay evidence is inadmissible at the sentencing phase, the introduction on any hearsay evidence should be subject to a harmless error analysis.

This Court has never held that a formula is required in weighing aggravating circumstances against mitigating circumstances. The Idaho Supreme Court's decision that the trial court must weigh all the mitigating circumstances together against each individual aggravating circumstance is improper.

ARGUMENTS

I

BECAUSE A TRIAL JUDGE IS IN A DIFFERENT POSITION, BY VIRTUE OF TRAINING AND EXPERIENCE, THAN ARE JURORS, THE PRESENCE OF IRRELEVANT EVIDENCE, WHEN THE TRIAL JUDGE DOES NOT CONSIDER THAT EVIDENCE IN IMPOSING SENTENCE, DOES NOT MAKE THE SENTENCE CRUEL AND UNUSUAL PUNISHMENT AND DOES NOT VIOLATE DUE PROCESS.

In Booth v. Maryland, 482 U.S. 496 (1987), this Court held that the introduction of a victim impact statement at the sentencing phase of a capital murder trial violates the Eighth Amendment for the reason that information about the victim that is unknown to the defendant, and opinions by the victim's relatives about the proper sentence to be imposed, is irrelevant to the sentencing process, thus its admission creates a constitutionally unacceptable risk that the jurors may impose a sentence of death in an arbitrary and capricious manner.

482 U.S. at 502-09. The first question presented in this petition for writ of certiorari is whether and to what extent this reasoning applies to a capital sentencing procedure where the trial court, rather than the jurors, makes the sentencing decision.

This Court has been concerned with the problems inherent when the jurors receive inadmissible evidence and are told to ignore it. In Jackson v. Denno, 378 U.S. 368 (1964), this Court condemned the practice of having the jurors both hear a confession and determine whether it is voluntary, and then instructing them to disregard the confession if they determine that it was involuntary. 378 U.S. at 377. The reason for this is the danger that the jurors, even after finding a confession involuntary, may not be able to disregard it in reaching their verdict. 378 U.S. at 388. This Court

has not, however, expressed that same fear with respect to the trial court. When a defendant moves to suppress physical evidence or a confession, the trial court must hold a hearing to determine the admissibility of the evidence. Jackson v. Denno, 378 U.S. at 376-77. Often at such a hearing, the trial court hears evidence showing that the defendant is guilty of the charges; this does not, however, preclude the trial court from presiding at the trial and indulging in the presumption of innocence when making various rulings that affect the outcome of the case. This is based on the presumption that the trial court will consider only admissible evidence in reaching a determination. This Court has further recognized that there is a difference between judge sentencing and jury sentencing, observing that "it would appear that judicial

sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and is therefore better able to impose sentences similar to those imposed in analogous cases." Proffit v. Florida, 428 U.S. 242, 252 (1976). This Court therefore seems to have accepted the presumption that a trial court will disregard inadmissible evidence in making a required determination.

In the present case, the trial court received a letter from the victim's father giving information about the victim and giving an opinion about the proper sentence to be imposed. The trial court, however, took no account of the letter in its sentencing findings. Even though the trial court stated that it had endeavored to avoid anything that might

be hearsay, not pertinent, or not supported by the evidence, the Idaho Supreme Court set aside the sentence, apparently concluding that the presence of such information was a per se violation of the defendant's rights. State v. Charboneau, ___ Idaho ___, ___, 774 P.2d 299, 319 (1989). Certainly, if the trial court had relied upon such information in sentencing the defendant, the sentencing procedure would have been a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. In this case, however, because the trial court did not rely upon this information and stated that it had disregarded the information, the question is whether presence of this information before the trial court "so infected the entire proceedings with unfairness as to render the resulting sentence a denial of due process." South Carolina v.

Gathers, ___ U.S. ___, ___, 109 S. Ct. 2207, 2216, 104 L. Ed. 2d 876, 890 (1989) (O'Connor, J., dissenting). For the reason that there should be no presumption that the trial court was either mistaken or untruthful when it stated that it had not considered the information from the victim's family, Amici Curiae urge this Court to grant certiorari and hold that the presence of this information did not result in a denial of due process and did not result in a sentencing proceeding that violated the Eighth Amendment's prohibition against cruel and unusual punishment.

Amici Curiae are concerned by this issue because their sentencing procedures are similar to that of Idaho. For example, in Arizona, like Idaho, the trial court makes the sentencing determinations, and may consider in aggravation only those factors listed in

the statute. Arizona Revised Statutes Annotated § 13-703(F). In Arizona, like Idaho, the victim of a felony or the family of a victim who has died has the right to appear at sentencing and give their views; however, unlike Idaho, this provision only applies in non-capital cases. Arizona Revised Statutes Annotated § 13-702(F) & (G). Thus, when the trial court sentences a defendant for both a capital offense and a noncapital offense, the trial court often will have victim impact evidence presented to it. The Arizona courts, however, indulge in the presumption that the trial court, in making the sentencing determination in a capital case, will consider only that evidence that is relevant and admissible at the sentencing proceeding. State v. Beaty, 158 Ariz. 232, 244, 762 P.2d 519, 531 (1988), cert. denied, ___ U.S. ___,

109 S. Ct. 3200, ___ L. Ed. 2d ___ (1989). Amici Curiae therefore urge this Court to grant the petition for writ of certiorari and determine whether it is constitutionally permissible, in a capital sentencing, to accept the presumption that a trial court will not consider evidence that is irrelevant and inadmissible under Booth v. Maryland, or whether the presence of such evidence is error per se, as the Idaho Supreme Court has held.

II

THE SIXTH AMENDMENT DOES NOT PRECLUDE THE INTRODUCTION OF HEARSAY EVIDENCE AT THE SENTENCING PHASE OF A CAPITAL CASE, AND IF THE SIXTH AMENDMENT DOES PRECLUDE THIS TYPE OF EVIDENCE, ADMISSION OF SUCH EVIDENCE IS SUBJECT TO A HARMLESS ERROR ANALYSIS.

In Green v. Georgia, 442 U.S. 95 (1979), this Court vacated the sentence of death because the trial court had precluded the defendant from introducing

hearsay evidence that potentially mitigated the sentence to be imposed. The second question presented is whether the Sixth Amendment applies to the sentencing phase of a capital offense, and if it does, whether the introduction of such evidence is subject to a harmless error analysis.

This Court has previously stated that the sentencing authority should be aware of all the relevant facts when imposing sentence. E.g., Lockett v. Ohio, 438 U.S. 586 (1978); Tison v. Arizona, 481 U.S. 137 (1987). In Williams v. New York, 337 U.S. 241 (1949), this Court held that the introduction of hearsay evidence at the sentencing phase of a capital case did not violate due process. This Court has yet to determine whether the introduction of hearsay evidence at the sentencing phase violates

the Sixth Amendment. This Court has held that, although the sentencing phase is similar to the trial phase in some respects, it is not identical. Compare Bullington v. Missouri, 451 U.S. 430 (1981), with Poland v. Arizona, 476 U.S. 147 (1986). Amici Curiae therefore request that this Court grant the petition for writ of certiorari, and hold that such evidence is admissible at the sentencing phase.

Further, this Court has held that a violation of the right of confrontation at the trial stage is subject to a harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). The Idaho Supreme Court refused to apply a harmless error analysis to the introduction of such evidence, and thus in effect held that the introduction of a letter from the victim's father was error

per se. 774 P.2d at 319. It would appear from this Court's reasoning in Van Arsdall that a harmless error analysis would apply with the same force to the sentencing phase as it does to the trial phase. Amici Curiae therefore request that this Court grant the petition for writ of certiorari and hold that a harmless error applies to the sentencing phase.

III

FEDERAL LAW DOES NOT MANDATE THE HIGHLY STRUCTURED BALANCING TEST REQUIRED BY THE IDAHO SUPREME COURT.

This Court has yet to require that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt, and has yet to impose any system of weighing on the state courts. See Harris v. Pulley, 692 F.2d 1189, 1195 (9th Cir. 1982), vacated on other grounds, 465 U.S. 37 (1984). The

Idaho Supreme Court held that the trial court erred in failing to weigh all of the mitigating circumstances against each individual aggravating circumstance in determining the sentence. 774 P.2d 324. Because there is no support in any of this Court's decisions for such a requirement, Amici Curiae request that this Court grant the petition for writ of certiorari and hold that the United States Constitution imposes no such requirement.

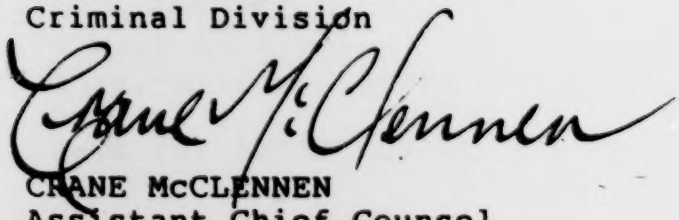
CONCLUSION

Because the trial court stated that it had endeavored to avoid anything that might be hearsay, not pertinent, or not supported by the evidence, the presence of inadmissible evidence at the sentencing did not result in a denial of due process and did not violate the Eighth Amendment's prohibition against

cruel and unusual punishment. Further, the introduction of the letter from the victim's father was admissible, and if not, was subject to a harmless error analysis. Finally, the Idaho Supreme Court erred when it held that the trial court must weigh all the mitigating circumstances together against each individual aggravating circumstances. This court should therefore grant the petition for writ of certiorari and reverse the decision of the Idaho Supreme Court.

Respectfully submitted,
ROBERT K. CORBIN
Attorney General

JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division



CRANE McCLENNEN
Assistant Chief Counsel
Criminal Division
(Attorney of Record)

Attorneys for AMICI CURIAE

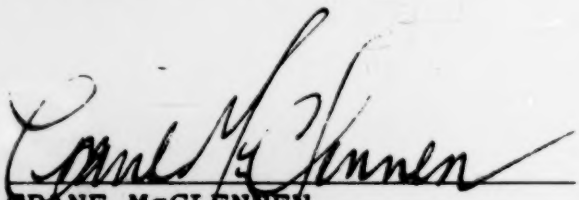
CERTIFICATE OF SERVICE

THREE COPIES of this Brief were mailed August 25, 1989, to:

LYNN E. THOMAS
Solicitor General
Statehouse, Room 210
Boise, Idaho 83720
Attorney for PETITIONER

GREG J. FULLER
P.O. Box 30
Jerome, Idaho 83338
Attorney for RESPONDENT

SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20530



CRANE McCLENNEN
Assistant Chief Counsel
Criminal Division
1275 West Washington
Phoenix, Arizona 85007

Attorneys for AMICI CURIAE

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